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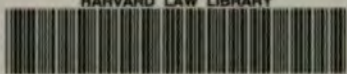
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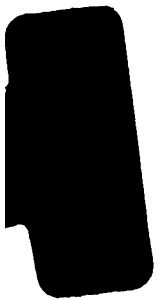
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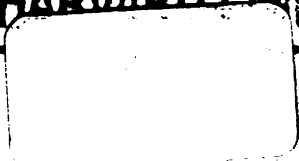
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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

AND IN THE

COURT FOR THE CORRECTION OF ERRORS

OF THE

STATE OF NEW-YORK.

BY JOHN L. WENDELL,  
Counsellor at Law.

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FOR THE  
CORRECTION OF ERRORS.

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HENRY H. VAN DYCK,		DANIEL JOHNSON.

THIRD DISTRICT.

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**OF THE**  
**SUPREME COURT OF JUDICATURE**  
**OF THE**  
**STATE OF NEW-YORK,**  
**DURING THE TIME OF THE TWENTIETH VOLUME OF THESE REPORTS.**

---

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FOURTH CIRCUIT, JOHN WILLARD.	EIGHTH CIRCUIT, NATHAN DAYTON.

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CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF NEW-YORK,

IN JULY TERM 1838—IN THE SIXTY-THIRD YEAR OF THE INDEPENDENCE OF  
THE UNITED STATES.

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Continued from Volume Nineteen.

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JENNINGS *vs.* MERRILL and others.

A contract of sale by a *factor* or agent, entrusted with goods for the purpose of sale, is *valid*, and will protect a purchaser against the *principal*, although no money is advanced, or negotiable instrument or other obligation given *at the time* of the contract; it is enough if an obligation be subsequently entered into *on the faith of the contract*, at any time whilst it remains unrescinded: It was accordingly held in this case, that the subsequent *endorsements* of promissory notes, and in anticipation of which the property was transferred, gave effect to the contract.

ERROR from the superior court of the city of New-York. This was an action of *trespass*, for taking and carrying away a quantity of merchandize, sent by the plaintiff, residing in Philadelphia, to a mercantile firm in New-York, transacting business under the name of Butler & Co. to be sold *on commission*. On the 9th October, 1834, Butler & Co. put into the hands of two of the defendants, transacting business in New-York, under the

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Jennings v. Merrill.

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name of *Merrill & Bowen*, an invoice of goods received from the plaintiff, amounting to \$3135.19, with a note attached, that they considered the goods as the property of *Merrill & Bowen* to be removed at their pleasure. The goods were then in the store of *Butler & Co.* The invoice was delivered to *Merrill & Bowen*, to secure them for endorsements to be made on the faith of it, upon the paper of *Butler & Co.*, to about the amount of \$2,500, as the same should be wanted by the latter firm in making purchases. In the latter part of the month of October, 1834, *Merrill & Bowen* endorsed two notes for *Butler & Co.*, amounting together to \$2301.33, which they were subsequently obliged to pay. These notes were dated on the 23d and 28th October. The members of the firm of *Butler & Co.* having absconded, *Merrill & Bowen* on the 20th December, 1834, took possession of the goods specified in the invoice, and nine days thereafter, this suit was commenced. The chief justice of the superior court charged the jury, that if they should find that the endorsements of *Merrill & Bowen* were given under the contract between them and *Butler & Co.*, relative to the property in question, and upon the faith thereof, that the defendants were entitled to a verdict. The counsel for the plaintiff excepted to the charge, and the jury found a verdict for the defendants. Judgment having been entered on such verdict, the plaintiff sued out a writ of error.

*D. Graham*, for the plaintiff in error, insisted that the contract between *Butler & Co.*, and *Merrill & Bowen* was not valid within the meaning of the statute, *Session Laws of 1830, p. 203*; that to render a contract of a *factor*, entrusted with the possession of merchandize for the purpose of sale, obligatory upon his *principal*, it should be shown that the case came strictly within the terms of the statute; that the sale or disposition of the property was for money advanced, or for a negotiable instrument, or other obligation given by the person to whom the goods were transferred at the time of the contract. Here was neither: at the time of the contract there was no money advanced, nor was any instrument or obligation given by the party to whom the

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Jennings v. Merrill.

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goods were transferred. A transfer in anticipation of *future endorsements* to be made, is not within the meaning of the statute. The act of 1830, is a copy of the British statute; *Hammond's Prin. and Agent*, 203. And he contended, that according to the adjudications under that statute, the transfer in this case should not be supported, and referred to the book last cited, from page 417 to 423.

G. C. Goddard, for the defendant.

*By the Court, NELSON, C. J.* This case turns upon the true construction of the 3d section of the act of 1830, which provides, that "every factor or other agent entrusted with the possession of any bill of lading, &c., or who shall be entrusted with the possession of merchandize, for the purpose of *sale*, or as a security for any advance to be made or obtained thereon, shall be deemed the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for sale or disposition of the whole or any part of such merchandize, for any money advanced, or negotiable instrument, or *other obligation in writing, given by such other person upon the faith thereof.*"

The agreement in anticipation of future endorsements, was, no doubt, inoperative under the statute, till the liability was actually assumed; but after that we perceive no substantial reason against giving to it full effect. When the liability of Merrill & Bowen was assumed, the contract was unrescinded and existing, and the jury have found the endorsements were made upon the faith of it. There is nothing in the statute requiring that the contract should be made at the point of time the money is advanced, or the negotiable instrument, or other obligation in writing given—all it exacts is that one or the other should take place upon the faith of it. There must be a contract of sale or pledge existing at the time of the advance or obligation entered into, but it may have been previously arranged, and if open and unrescinded, is as binding and operative under the statute, as if then made.

Judgment affirmed.

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The People v. Vail.

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## THE PEOPLE, on the relation of Benton, vs. VAIL.

On an information in the nature of a *quo warranto*, where the relator and the defendant were opposing candidates for the office of *county clerk*, the defendant being in under a former election, and having received a certificate of *re-election* from the county canvassers: It was HELD, that on the trial of the issue joined between the parties, it was competent to the relator to prove that in the return of the canvassers of one of the towns of the county, a mistake had occurred in omitting to state the number of votes given for each candidate; and such proof having been given, whereby it appeared that the relator and not the defendant was elected by the greatest number of votes, it was adjudged by this court, notwithstanding the certificate of the county canvassers, that the relator was *duly elected*.

It was further held, that the information was regularly filed on the *sixth* day of *January*, notwithstanding that the defendant was *lawfully holding over* in consequence of the relator not having received a certificate of election.

INFORMATION, in the nature of a *quo warranto* against the defendant for exercising the office of *clerk* of the county of *Orange*, averring that the *relator* is rightfully entitled to the office. The information was filed, January 6th, 1838. The cause was tried before the HON. CHARLES H. RUGGLES, one of the circuit judges, at the Orange Circuit, in April, 1838, when the jury found a special verdict. From the verdict and the stipulations of the parties, the following facts appear: At the fall election, in 1834, the defendant was elected clerk of the county of *Orange*, for the term of three years from the 1st day of January, 1835; and on the said 1st day of January, he entered upon the discharge of his duties, and has ever since exercised the office. The defendant was a candidate for re-election in the fall of 1837, and the relator was an opposing candidate; the board of county canvassers determined that the defendant was elected, he having received 2724 votes, and the relator 2706 votes; and they certified that 592 votes were given for the office of clerk in the town of *Monroe*, but that it was not mentioned in the *town canvass* for whom they were given. It was also proved, subject to an objection from the defendant as to the competency of the evidence, that of the 592 votes in the town of *Monroe*, for the office of clerk,

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The People v. Vail.

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323 were given for the relator, and 269 for the defendant—that the votes were so canvassed by the town canvassers, but that in making their certificate, after stating the whole number of votes given for the office of clerk, they omitted to state how many were given for each candidate. If these votes had been allowed, the relator would have been elected by a majority of 36 votes, but being rejected by the county canvassers, the defendant had a majority of 18 votes. The canvass in the town of *Monroe* was completed, and the certificates made on the 8th of November. At the meeting of the county canvassers on the 14th of that month, the supervisor of *Monroe* discovered the omission in the certificate for his town, and on the adjournment of the county board to the next day, he immediately returned home, and at a meeting of three out of five of the inspectors who presided at the town election, an addition was made to the original certificate, stating the true number of votes given to each of the candidates. This was made, signed by the three inspectors, and dated the 14th November. At the meeting of the county board the next day, the supervisor of *Monroe* again appeared, and presented the amended certificate: the board received so much of the certificate as was made on the 8th November, rejected the addition made on the 14th, and determined that the defendant was elected. On the 1st January, 1838, the relator took, subscribed and filed the proper oath, and demanded the possession of the office. On the 6th January, the information was filed, and on the 15th of that month the defendant took the oath of office.

*I. R. Van Duzer & H. G. Wisner*, for the people.

*J. W. Brown*, for the defendant.

*By the Court*, BRONSON, J. The certificate of the board of county canvassers that the defendant was elected clerk, was sufficient evidence of that fact. 1 R. S. 118, s. 17. But, I think, both upon principle and authority, that it was not conclusive. The same objection that is made by the defendant in this case, was strenuously urged by counsel in *The People v. Van Slyck*,

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The People v. Vail.

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4 Cowen, 297, and was then expressly overruled. In *The People v. Ferguson*, 8 Cowen, 102, it was held, notwithstanding the determination of the canvassers in favor of the defendant, that the court and jury could look beyond the ballot boxes, and enquire whether votes given for *H. F. Yates* were not intended by the electors for the relator *Henry F. Yates*. The decision of the canvassers was conclusive in every form in which the question could arise, except that of a direct proceeding by *quo warranto* to try the right. *The People v. Jones*, 17 Wendell, 81. But to hold it conclusive in this proceeding, would be nothing less than saying, that the will of the electors, plainly expressed in the forms prescribed by law, may be utterly defeated by the negligence, mistake or fraud of those who are appointed to register the results of an election. There is no ground in this case for imputing any intentional wrong either to the town inspectors, or the board of county canvassers. But if we cannot look beyond the certificate, for the purpose of correcting an error produced by negligence or mistake, we cannot interfere in a case of fraudulent misconduct on the part of the board of canvassers. In those legislative bodies, which have the power to judge of their own members, it is the settled practice, when the right of the sitting member is called in question, to look beyond the certificate of the returning officer; and I think a court and jury, with better means of arriving at truth, may pursue the same course.

When the town inspectors have completed their canvass and statement, and the poll lists and ballots have been destroyed, the statute declares, that the board of inspectors shall be dissolved. 1 R. S. 138, s. 51. There is, perhaps some difficulty in saying that the board of inspectors in *Monroe*, was legally assembled on the 14th November, when the addition was made to the original statement of the votes given in that town. But it is not necessary to examine that question. Conceding that the *county canvassers* decided correctly on the facts before them, I think we are bound in this proceeding to go back to the town canvass, and rectify the error in the statement of the inspectors. We are not called upon to say, that every possible question which may

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arise under the election laws, can be reviewed in this form. In this case, the votes in *Monroe* were regularly canvassed, and the inspectors set down on what they called a canvass sheet, the number of votes given to each of the candidates for the office of clerk. But in making their official statement, after stating the whole number of votes, they omitted by mistake to add how many were given to each of the persons voted for by the electors. There is no dispute about the facts; and if the court can ever look beyond the certificate of the returning officers, we certainly must do so in this instance.

If the votes in *Monroe* are added to those given in the other towns of the county, the relator was duly elected clerk, for the term of three years from the 1st of January, 1838.

But there is still a difficulty of some importance in this case. The defendant was an incumbent of the office at the time of the election in 1837, and although his original term expired with that year, he might still continue to discharge the duties of the office until a successor should be duly qualified. 1 R. S. 117, s. 10. As the relator had failed to obtain from the proper officers a certificate of his election, there was no evidence upon which the defendant was bound to surrender the office. It is then said, that the defendant was in the rightful exercise of the office on the 6th January, 1838, when the information was filed, and consequently that this proceeding cannot be maintained. Although there is force in this reasoning, especially as the defendant may be subjected to costs and damages, should the judgment be against him, 2 R. S. 582, § 34, 38, p. 585, § 48; yet I think the argument proves too much. If the relator could not take the necessary legal measures for asserting his title on the 6th January, he could never do it, and the defendant might continue to hold until the next triennial election, and thus defeat the relator altogether.

It is said that the information should not have been filed until after the 15 days had elapsed for taking the oath of office. 1 R. S. 119, § 21. How would the case have stood then? Had the defendant neglected to take the oath within the 15 days, his



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title to the office, so far as relates to the election of 1837, would have been at an end. 1 *R. S.* 122, § 34. *The People v. Jones*, 17 *Wendell*, 81. But his right to hold over until a successor was duly qualified, would still remain. This was an office which ought not to be left vacant, and the relator could only enter after obtaining the judgment of this court in his favor. 2 *R. S.* 582, § 32. Had the filing of the information been delayed until the fifteen days had elapsed, and the defendant had neglected to take the oath within that time, the argument that he was in the rightful exercise of the office, would then have been just as cogent as it is now; and I repeat, that it proves too much. It amounts to nothing less than saying, that although the relator has a perfect title to the office, the means of enforcing it have not been provided by law.

The defendant did in fact take the oath of office on the 15th of January, and from that time he held under the election of 1837. Had the information been filed after that day, it would still have been true that the defendant was in the rightful exercise of the office. He was in under lawful authority, and there was only one mode in which the relator, or any one else, could question his title. This brings us to what I think the true solution of the supposed difficulty. This is a proceeding in which the right to an office may be tried. The information will lie not only where the defendant has obtruded into the place without any color of right, but where he has entered under competent legal authority. It reaches beyond those evidences of title which are conclusive for every other purpose, and enquires into and ascertains the abstract question of right.

It was conceded on the argument, that the defendant has acted in perfect good faith in retaining the office. Whether under such circumstances he can be subjected to the payment of damages, should they be claimed, is a question which we are not now called upon to decide. Should the right of the relator to recover damages be the necessary consequence of our judgment, cases of this description may call for some new legislation. But on the present occasion we have nothing to do with consequences.

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Our office is discharged when we pronounce judgment upon the matter of right. The relator was duly elected, and is entitled to the office.

Judgment for the People.

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GREGORY vs. THOMAS.

Notice of the existence of an unpaid prior mortgage of personal property, destroys the preference which a second mortgagee would otherwise be entitled to claim in consequence of possession not accompanying the first transfer, and by reason of the omission of the first mortgagee to *refile* his mortgage within the period prescribed by statute.

A second mortgage for the same debt does not extinguish the first; to render the second security a bar to the first, there must be a *release* express, or at least implied from a *covenant not to sue*.

ERROR from the Albany mayor's court. This was an action of *trover* brought by Thomas against Gregory, for a coach and harness taken possession of by the defendant in September, 1835. The plaintiff claimed the property under a mortgage executed to him by *John Wyman*, bearing date and filed in the register's office of the city of New-York, on the 12th September, 1834. The defendant justified the taking possession of the property under a mortgage of the same, executed to him by *Wyman*, on the 19th of June, 1834, which was filed in the register's office in New-York on the 28th of June, 1834, and was conditioned for the payment of \$350, with interest, in weekly instalments of ten dollars each. In March, 1835, the defendant by his agent, called on *Wyman*, who during all the time since the date of the defendant's mortgage, had remained in possession of the coach and harness, to take possession of the same in foreclosure of the mortgage. It was then agreed between such agent and *Wyman*, that day of payment should be extended to *Wyman*, upon his executing to the defendant a new mortgage of the same and other property. In pursuance of such arrangement, a mortgage was executed on the 18th May, 1835, conditioned\* for the payment

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of \$390.95, on the 18th October then next: which mortgage was filed in the clerk's office of the county of Albany, in which county Wyman, resided at the date thereof. The first mortgage was given by Wyman on the sale of the coach to him by the defendant. The defendant *offered to prove* that at the time of the execution of the mortgage to the *plaintiff*, Wyman objected to giving the plaintiff a mortgage upon the coach, as Gregory had sold it to him, and *then had a mortgage upon it which ought to be paid*: to the introduction of which evidence the plaintiff objected, and the court excluded it. The defendant excepted. The jury, under the charge of the recorder, found a verdict for the plaintiff, on which judgment was entered. The defendant sued out a writ of error.

*J. Holmes*, for plaintiff in error.

*S. Stevens*, for defendant in error.

*By the Court*, COWEN, J. The claims of the parties were founded on conflicting mortgages given by Wyman, the owner of the carriage and harness, to each party, the mortgagor all along retaining the possession, up to the time when the defendant below, Gregory, took them for default of paying his debt. His first mortgage was prior to that of the plaintiff below, being dated the 19th of June, 1834. The plaintiff's was dated September 12th of the same year; and the defendant took another mortgage dated May 18th, 1835. Thus, documentally, the defendant below had the prior right. The mortgages were respectively filed according to the statute. 2 R. S. 71, § 9, 2nd ed. But the plaintiff said that neither was possession changed, nor did the defendant keep his first mortgage on foot by filing a copy within thirty days, next preceding the 12th of June, 1835, when the year from the first filing expired, 2 R. S. 71, § 11; that in either point of view the defendant's mortgage had lost its effect, and the plaintiff's had obtained the precedence. This was doubtless so upon the case as it stood when the defendant below offered to prove that actual notice

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of his first mortgage was given to the plaintiff below, when his was taken. Either the continued possession, or the non renewal by filing a copy, would have let in the plaintiff, had he come as a mortgagee in good faith ; but it is only the *bona fide* mortgagee or purchaser, whom the statute protects. 2 R. S. 70, 71, § 5, 9.

And the offer to prove that the plaintiff below took his mortgage with actual notice of the defendant's prior mortgage, destroyed the character in which alone he could be protected. To say that a man takes *in good faith*, when he acts with notice, and of course under conscious hostility to another who has before taken a similar title, would be a legal solecism. The object of the statute here is that of all the other registry acts, to prevent imposition upon subsequent purchasers and mortgagees, who must many times govern themselves by appearances. When every thing is actually explained to them, they have the best kind of notice ; and must be holden to take subject to the prior incumbrance.

But it is said that the defendant's second mortgage extinguished the first ; and consequently being put to stand exclusively on the last, which was in 1835, the plaintiff's mortgage of the previous September is let in. The argument is against all the books, ancient and modern. Adjudications of several centuries, upon such cases, of every variety of form, in England, in this state, and in neighboring states, settle the proposition that a subsequent security for a debt of equal degree with a former, for the same debt, will not, by operation of law extinguish it. Thus, one bond for the same debt secured by another, shall not extinguish the former, or in any way impair its force. *Manhood v. Crick*, Cro. Eliz. 716. *Norwood v. Gripe*, id. 727. *Rawdon v. Turton*, Brownl. 74. *Maynard v. Crick*, Cro. Car. 86. *Ene's case*, Lit. Rep. 58. It is said in *Higgen's case*, 6 Rep. 45, that "a statute staple, or bond in nature thereof, is but a bond recorded, and one bond, be it of record or not of record, can not merge another. Also a bond, and a bond in nature of a statute staple, are two distinct liens made by assent of parties without process of law, whereof the one hath no dependency on the other." And see

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*per Cur. in Rhoades v. Barnes*, 1 Burr. 9. Taking a bond and mortgage for sealed notes does not extinguish them. *Phelps v. Johnson*, 8 John. 54, 58. So even a bond from a third person to pay certain interest on a mortgage against a testator, there being no agreement to take it in satisfaction, was held no bar to a suit for the interest on the mortgage. *Hamilton v. Callender's Ex'rs*, 1 Dall. 420. A judgment recovered on another judgment is not a satisfaction of the latter till the money is paid. *Preston v. Preston*, Cro. Eliz. 817. *Mumford v. Stocker*, 1 Cowen, 1. *Andrews v. Smith*, 9 Wendell, 53. Though it is otherwise where one judgment is set off against another; for that is in effect a payment, or if not allowed, it is an adjudication against its validity, either in whole or in part, so far as it is allowed, or passed upon and disallowed, in the second suit. *Doty v. Russell*, 5 Wendell, 129. *McGuinty v. Herrick*, *id.* 240, 244. Settling and taking a sealed due bill for rent will not affect the remedy by distress or action. *Cornell v. Lamb*, 20 John. 407, 409, and the cases cited at the latter page by Mr. Justice Woodworth. But the cases go farther. In all those respecting specialties, which I have cited from Cro. Eliz., Cro. Car. and Lit., there was an agreement to accept and an acceptance of the second bond in satisfaction of the first; and yet held that this was no accord and satisfaction. The bonds were between the same parties. To make the second a bar, there must be a release express, or at least implied, from a covenant not to sue. And this distinction was held in *Phelps v. Johnson*, 8 John. 58. In *Ene's case*, the plea was that the plaintiff took the second obligation in satisfaction of the first. Hutton, J. said, a chose in action cannot be a satisfaction. Even a security of a higher nature, if it be taken expressly as a collateral security, will not extinguish the inferior. *Day v. Leal*, 14 John. 404. And more as was said in *Higgen's case*, where the securities are of equal degree, they shall be intended and held to be distinct and independent, although both are liens upon property. A debt is not honestly extinguished till it is paid in cash; and to multiply artificial mergers will be far from tending to fairness of dealing.

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No matter how much, nor how many securities for a debt, they are but so many securities in favor of justice ; and the cash payment of one sweeps them all.

In the case at bar, there was no agreement pretended that the first mortgage to the defendant should be satisfied by the second ; and even if there had been, it was but the receiving of one chose in action for another.

The judgment of the mayor's court must be reversed ; and a *venire de novo* go from the same court.

Judgment reversed.

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HOFFMAN and others vs. CAROW.

An *auctioneer* who sells stolen goods is liable to the owner in an action of *trover*, notwithstanding that the goods were sold, and the proceeds paid over to the thief *without notice* of the felony.

The exception of sales *in market overt* which prevails in England, is not recognized here.

ERROR from the superior court of the city of New-York. Carow brought an action of *trover* against Hoffman & Co. *auctioneers* in the city of Baltimore, for a quantity of merchandize, stolen from him in the city of New-York, and forwarded by the thief to the defendants in Baltimore, to be sold at auction. The defendants, without notice of the theft, sold the merchandize and paid over the proceeds to the thief ; and they insisted, in their defence, that having done it in good faith, in the ordinary course of their business, they ought not to be held liable, and that the plaintiff should be non-suited. The court refused to grant a non-suit, and charged the jury that the plaintiff was entitled to recover. The defendants excepted. The jury found a verdict for the plaintiff, upon which judgment having been entered, the defendants sued out a writ of error.

D. B. Ogden, for the plaintiffs in error.

J. Anthon, for the defendant in error.

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*By the Court*, NELSON, C. J. There can be no doubt that the felon did not acquire any title to the goods in question, and could not transfer title even to a *bona fide* purchaser. 8 *Cowen*, 240. 14 *Wendell*, 34. An exception to this general rule exists in England, in respect to sales made in market overt, but which has no application here.

It is supposed the action will not lie against the defendants below, because the property was not found in their possession; and that the owner must follow and demand it of the person in whose possession it may be found. It is difficult to perceive any well founded distinction between the two cases, in respect to the liability of the parties; both have assumed and exercised a control over the property without right or authority, and the hardship of responding in damages is as great to one as to the other. Both lose the value of the property which they honestly purchased and paid for. This distinction was disregarded in *Williams & Chapin v. Merle*, 11 *Wendell*, 80. The owner is not in fault, as the property was taken without his knowledge or consent; and as between him and any other person, he presents both legally and equitably the higher and better title.

Judgment affirmed.

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HALLENBECK & MILLER vs. GARNER.

Under the statute authorizing *summary proceedings* against a person holding over and continuing in possession of real estate sold by virtue of an execution against him, proceedings may be had against the *servant* or *agent* of the debtor, or against a *third person* who has entered into possession under title derived from the debtor *subsequent* to the attaching of the lien of the judgment under which the property was sold.

To justify a warrant against such third person, the fact that he entered under title so *subsequently* acquired, must be distinctly alleged, or the conviction will be quashed.

CERTIORARI to remove proceedings had before the recorder of Hudson under 2 *R. S.* 512, § 28, *sub.* 4. Garner, on the 2d March, 1836, made affidavit before the recorder that a farm of

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53 acres in Hillsdale, Columbia county, was on the 15th May, 1834, sold by the sheriff of that county on several executions against George Nooney, and purchased by John Nooney; that John assigned his interest under the sale and certificate to Garner, and the sheriff, on the 17th August, 1835, conveyed the property to Garner. The affidavit further stated, that at the time the judgments were entered of record, George Nooney, the debtor, was the owner in fee of the property, which was then in his possession, or in the possession of some person holding under him; that Hallenbeck, at the time of making the affidavit, was in possession of the lands and part of the dwelling house thereon; and that Miller was in possession of the residue of the house, holding under Hallenbeck; that Hallenbeck holds under one Lewis Haywood, and Haywood holds under some demise, lease, deed or contract, verbal or written, from George Nooney. A summons was issued by the recorder, requiring Hallenbeck and Miller to remove from the premises, or to show cause before the recorder, on the 7th March. No sufficient cause being shown, a warrant issued on the last mentioned day, and Hallenbeck and Miller were removed from the property, and Garner was put in possession. Hallenbeck and Miller sued out the *certiorari*.

*J. W. Edmonds*, for Hallenbeck and Miller.

*M. T. Reynolds*, for Garner.

*By the Court*, BRONSON, J. The statute authorizes a proceeding of this kind, "where any person shall hold over and continue in the possession of any real estate which shall have been sold by virtue of an execution *against such person*, after a title under such sale shall have been perfected." 2 R. S. 512, § 28, *sub. 4*. The applicant did not state facts enough in his affidavit to give the officer jurisdiction. Conceding that this remedy may be applied against one who comes into possession of the land under the judgment debtor, as well as against the judgment debtor himself, *Birdsall v. Phillips*, 17 Wendell, 474, it can only be where



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the third person holds as the mere *servant* or *agent* of the judgment debtor, or enters under title derived from him *subsequent* to the lien of the judgment under which the sale was made. Although the affidavit affirms that Hallenbeck and Miller hold under Haywood, and that Haywood holds under George Nooney, the judgment debtor, there is nothing whatever to show that Haywood's right to the possession is not paramount to that which Garner has acquired under the judgment. For aught that appears, Haywood may have entered, and so may Hallenbeck and Miller, long before the judgments were docketed. Although the affidavit states that Nooney was the owner in fee of the property at the time the judgments were entered of record, that fact is not inconsistent with the supposition that Hallenbeck and Miller, or Haywood their immediate landlord, were in possession long before, and now have an unexpired term in the land. In all cases of summary process, where the court or officer does not proceed according to the course of the common law, every fact necessary to give jurisdiction must be distinctly alleged, or the proceeding cannot be upheld. In this case the proceeding before the recorder should be quashed, and restitution ordered.

Ordered accordingly.

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 NELLIS vs. CLARK.

Where a contract is entered into for *fraudulent* or *illegal* purposes, the law refuses its aid to enable either party to disturb such parts of it as have been *executed* or carried into effect; and as to such parts as remain *executory*, it will not compel the contractor to perform his engagements or pay damages for non-performance—thus, in both cases, leaving the parties where it finds them. *Accordingly it was held* in this case, that a plaintiff, chargeable with notice, was not entitled to recover in an action on a promissory note given in part consideration of a fraudulent conveyance of land.

It is not necessary to the maintenance of such defence that the facts constituting it should appear on the plaintiff's own showing; it is competent for the defendant to adduce proof on his part.

See the dissenting opinion of the CHIEF JUSTICE.

THIS was an action of *assumpsit*, tried at the Oneida circuit in April, 1846, before the HON. HIRAM DENIO, then one of the circuit judges.

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The plaintiff claimed to recover the amount of a promissory note for \$300, made by the defendant, bearing date 13th October, 1828, payable to *William T. Curtiss* or *bearer*, four years after date. On the part of the defendant it was shown that on the 12th March, 1828, *John Buttolph* conveyed to the defendant, by deed with warranty, 56 acres of land, in consideration of the sum of \$1,200 : of which \$500 were paid down, and the residue secured by a bond and mortgage. In October, 1828, *Buttolph* purchased a lot of land of *William T. Curtiss*, and by arrangement between them and the defendant, the bond and mortgage executed by the defendant were surrendered to him, upon his making two notes to Curtiss for the amount of \$700, for the recovery of one of which the present suit is prosecuted. The notes thus given were subsequently delivered over by Curtiss to one *Beecher*, who had been appointed an assignee of *Buttolph* on the latter obtaining his discharge as an insolvent debtor ; *Buttolph* having re-conveyed the land purchased by him of Curtiss. In November, 1830, one *Joseph Bruce* obtained judgment in an action of ejectment prosecuted by him against the defendant for the recovery of the 56 acres, and possession was duly delivered to him by virtue of a writ of possession. In December, 1831, *Beecher* transferred the notes to *Bruce*, who subsequently transferred them to *Nellis*, the plaintiff in this cause. Both *Bruce* and *Nellis* had notice of the consideration of the notes, and that the land (the consideration of the notes) had been lost by the defendant. On this state of facts the defendant insisted that inasmuch as the consideration of the notes had failed, he was entitled to a verdict. The judge, however ruled, that as it had not been shown that *Bruce* recovered by title paramount to that conveyed to the defendant, the latter was not entitled to a verdict. The counsel for the defendant then offered to prove, that at the time of the conveyance from *Buttolph* to the defendant, an action of slander was pending in favor of one *Otis* against *Buttolph*, in which a recovery was subsequently had, judgment entered and execution issued ; that by virtue of such judgment and execution, the 56 acres were sold at public auction, and

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bought in by *Bruce*, who thereupon brought the action of ejectment above mentioned, and recovered *on the ground that the conveyance to the defendant was fraudulent* in respect to the creditors of *Buttolph*, and particularly in respect to *Otis*, the plaintiff in the slander suit, and that thus the defendant was deprived of the premises, for the purchase money of which the note in question was in part given. This evidence was objected to by the plaintiff's counsel, who insisted that it was not competent to the defendant to *allege his own fraud* in exoneration of his liability. The judge sustained the objection, and under his direction the jury found a verdict for the plaintiff for the amount of the note and interest. The defendant asks for a new trial.

*W. Crafts & C. P. Kirkland*, for the defendant.

*J. A. Spencer*, for the plaintiff.

*By the court*, COWEN, J. The question is whether a promise to pay for property purchased with the intention to defraud creditors can be enforced.

I lay out of view the failure of consideration, because I agree that such a purchaser would never be protected on his own account. He would be esteemed guilty of a crime against social policy, and though he had paid the most ample consideration, he could not recover it back. *Jackson, ex dem. Malin v. Garnsey*, 16 *Johns. R.* 189, 192. *Bolt v. Rogers*, 3 *Paige*, 154. *Perkins v. Savage*, 15 *Wendell*, 412. In *Surlott v. Beddow*, 3 *Monroe*, 109, it was expressly adjudged that a vendee who purchased to defraud creditors cannot maintain an action for indemnity, against the vendor, by reason of an eviction by an execution, levy and sale at the suit of the vendor's creditor. And the rule is precisely the same, whether the act be declared fraudulent at the common law or by statute, and the same at law as in equity. *Jackson v. Garnsey* related to a statute fraud upon creditors, and was decided at law; *Perkins v. Savage* to a fraud which was declared such on principles of the common law; and so of *Bolt v. Rogers*, the one being at law and the other in equity. The

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decided weight of authority, however, is that the fraud upon which we are now called to pass, is so both at common law and by statute. In 3 Co. 78, *Fermor's case* it is taken as a general rule, that "the common law doth so abhor fraud and covin, that all acts as well judicial as others, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law, wrongful and unlawful." And in *Cadogan v. Kennett*, Cowp. 434, Lord Mansfield said of this very fraud upon creditors, that "the principles and rules of the common law, as now universally understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4." The same thing was said in substance by Spencer, J. who delivered the opinion of the court of errors in *Sands v. Hildreth*, 14 Johns. R. 498; *Sands v. Codwise*, 4 id. 536, S. P. I shall not multiply authorities on what no one will dispute; but have said so much to avoid all question that the books which deny aid to the party who has been guilty of fraud, do so upon a general principle applicable alike to every species of fraud in whatever forum it may be drawn in question.

I have so far treated the fraudulent contract as if it had been executed, as if land had been conveyed and money paid under it; and the result is, that although Clark lost the land and the money paid, neither law nor equity will ever help him to recover it back. The rule is thus laid down in *Chitty on Contracts*, 214: "An individual shall not be assisted by the law in enforcing a demand originating in a breach or violation, on his part, of its principles or enactments." *Dedham Bank v. Chickering*, 4 Pick. 314. *Armstrong v. Toler*, 11 Wheat. 258. *Bartle v. Nutt*, 4 Pet. 184. *Perkins v. Savage*, 15 Wendell, 412, S. P. In *Perkins v. Savage*, money was advanced by the plaintiff to enable the latter to subscribe for and pay the advance on stock in a newly incorporated company for the plaintiff's benefit, in a manner which would operate as a fraud upon the provisions of its charter. A balance being unaccounted for, the plaintiff sued to recover it. His right to recover was denied, and Mr. Justice Nelson states the

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principle, *in pari delicto, potior est conditio defendentis*. In *Bartle v. Coleman*, Mr. Justice Baldwin amplifies the Latin maxim : "The law leaves the parties to such a contract as it found them. If either has sustained loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practised fraud. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from one to the other, or to equalize the benefits or burthens which may have resulted by the violation of every principle of morals and of laws." Again, in *Bolt v. Rogers*, 3 *Wendell*, 157, Chancellor Walworth says, "Wherever two or more persons are engaged in a fraudulent transaction to injure another, neither law nor equity will interfere to relieve either of those persons, as against the other, from the consequences of their own misconduct."

Such are the principles upon which Clark, the defendant, stands forever disabled to recover back what he actually paid for this land. He crippled himself by participating with Buttolph in the fraud upon the creditors of the latter. But when Clark comes to turn the same principle upon Buttolph, for it is not denied that this defence is, in legal effect, against him, (the plaintiff representing him,) the application of the principle is denied. We are called upon to help Buttolph recover a sum of money which he openly declares is due to him as the wages of iniquity, the consideration of a fraudulent sale of his land in pursuance of a conspiracy between him and the defendant to defraud Otis and others ; an offence indictable as such at common law under most circumstances, *Best, J. in Doe, dem. Roberts, v Roberts*, 2 *Barn. & Ald.* 370, and since made so by statute, without the ingredient of conspiracy.

Why the law should single out the fraudulent debtor, and make him the special object of its favor, we have not been informed upon any authority ; and I think we shall see that we have an abundance of authority which will warrant us in holding, that so long as the fraudulent contract is *unexecuted*, the principles cited apply with all their force as well to this sort of unlawful dealing as to any other. Take the case that Clark had agreed with Buttolph to

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reconvey the land on his getting clear of Otis and his other creditors. *St. John v. Benedict*, 6 Johns. Ch. R. 111, is an authority that the chancellor would never decree the reconveyance in equity. There a bill was filed by St. John against Herrington, to enforce precisely such a contract. And see *Jones v. Read*, and *Wright v. Wright*, S. P., hereafter cited. Chancellor Kent asks, "Shall this court help a party in the performance of an agreement made on purpose to defraud creditors?" He answers, "This court will not interfere to enforce the specific performance of a contract iniquitous and fraudulent in its very foundation." *Herrick v. Grow*, 5 Wendell, 579, goes upon the same principle. Administrators agreed to procure a surrogate's order, and convey the land of their intestate at a certain price. The bond was held void as being a fraud on the heirs and on creditors. *Bridgewater v. Brookfield*, 3 Cowen, 299, S. P. *Myers v. Hodges*, 2 Watts, 381, S. P. In *Bolt v. Rogers*, before cited, such an agreement was executed and the purchaser paid the price. On a bill filed by the heirs, in the vice chancery of the fourth circuit, I set the sale aside as far as it operated against them; leaving the immediate parties to their remedy. Afterwards, on a bill filed by the purchaser to rescind the bargain, and be restored to the land he had conveyed in exchange, I refused to relieve him, because the contract was an executed one, and the parties must remain where they were. That was the decree in question on appeal, in 3 Paige, 154.

I have thus placed certain cases in juxtaposition wherein the courts have refused to enforce and also to rescind agreements in fraud of the rights of others, when called to act as between the parties, in order to see more clearly that the refusal in both instances goes on the same principle; and, at the same time, to present the distinction upon which all the like cases have gone. This distinction is, that where the contract is *executed*, it is, in effect, binding between the parties, as in *Bolt v. Rogers*; but where it remains *executory*, it is, as in *Herrick v. Grow*, in effect a nullity. Both, it will be perceived, depend on the principle laid down in several books from which I have cited, and others

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to be noticed, that the law will not lend itself to aid either party. Such is the common law ; and whether the case before us be considered as arising under that law or the statute, the rule is the same. In *Jackson v. Garnsey*, Spencer, J. in speaking of the statute 27th Elizabeth, which, in respect to the effect of a conveyance as between the parties, is the same as 13 Elizabeth, says, "as between the parties they are expressly excluded from its operation ; and left as they stood at the common law." And it may not be out of place to repeat and pursue a little here what I have before attempted to show, that we are standing on common law ground. The statute does not say, that a contract executory shall be binding between the parties. 1 R. L. of 1813, 75, § 2. It declares all contracts, both executory and executed, to defraud creditors, void only as against the latter. It was wanted for nothing else. It was but declaratory ; and were it not for the 4th section giving additional sanctions, the common law would have reached every purpose. Now had the statute stopped with declaring the contract simply void, it would have changed the common law by avoiding one class, viz. executed contracts, which that law would not interfere with. Therefore the statute withdraws itself entirely from any interference between the parties, with the intent to let the common law take its own course.

I have examined the more anxiously to satisfy myself whether the statute works any change of right between the parties, because, if it does not, then I think we shall see there is an end of this claim upon principle, if not upon direct authority. I feel much strengthened in the conclusion that there is no change, from what was said by Blackford, J., who was opposed to the defence here set up, in *Findley v. Cooley*, 1 Black. R. 262. He insists it is but a recognition of the common law, except in one particular ; and he adds the opinion of Lord Coke, in *Co. Litt.* 290, b., Chief Justice Marshall in 1 *Cranch*, 316, and Chief Justice Kent in 9 *Johns. R.* 339, to those which I have cited. He then refers to *Twyne's case*, 3 *Coke's R.* 80, and *Upton v. Basset*, *Cro. Eliz.* 245, as a foundation for supposing that, by the common law, no person should avoid an estate made by fraud, except he who had

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a former right, interest or demand ; whereas the statute of Elizabeth, instead of being limited to former interests or demands, makes provision in favor of those which arise subsequently to the conveyance ; and this is according to the suggestion in *Roberts on Fraud. Conv.* 10, 11, and *vid. id.* 641. Blackford, J. adds : " There is not a *dictum* any where for the position, that the English statute is in derogation of the common law. On the contrary, it is either declaratory of the common law or an enlargement of its principles." And he expressly denies that as between the parties, it worked any change at all, though we shall see in the sequel, that the learned judge drew a very opposite conclusion, to that which, with deference, I think follows from the principle which he advances with so much confidence and justice.

It seems to me then, that we can not mistake, in saying we are bound to look at the question before us precisely as if there were no statute on the subject. What conceivable difference, in principle, is there between the cases already cited and the one at bar ? What difference between all that numerous class of contracts, such as bonds or notes given under arrangements to defraud third persons, creditors or others, which have been declared void at the common law, and the note before us ? Marriage brokerage contracts are a familiar instance, because they tend to work a fraud as against a third party who is to be drawn into the marriage. 3 *P. Wms.* 74, note (1), and particularly the case there of *Neville v. Wilkinson*. Secret agreements for preference under deeds of composition, *Chitty on Contr.* 225, *Case v. Gerrish*, 15 *Pick.* 49, or in consideration of withdrawing opposition to the discharge of an insolvent, *Wigging v. Bush*, 12 *Johns. R.* 306, or of puffing at an auction, *Chitty on Contr.* 227, are void also as being, in the first cases, fraudulent against creditors, and in the latter against bidders ; and the party sued on such and the like contracts may give the fraud in evidence to show that it is a case in which the law ought not to move. In *Holman v. Johnson*, *Cowp.* 342, Lord Mansfield said, " The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however



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that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to real justice as between him and the plaintiff; by accident, if I may so say. The principle of public policy is this, *ex dolo malo non oritur actio*. No court will lend its aid to a man upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*." These remarks cover the whole ground on which Clark the defendant stands, as I attempted to show in the outset; neither he nor Buttolph have any positive remedy on their own account. But as the law finds them, so it will leave them. They derive that kind of negative assistance which arises from their cases being mutually such that the law will not tarnish its hands by rescuing them from the mire.

I have met with but one case at law in which the principles laid down by Lord Mansfield in *Holman v. Johnson*, have been either applied or examined as between a vendor and vendee of property for the purpose of defrauding creditors. I will not say there may not be others; but if so, they have escaped my research, which has been made with some pains. The case I allude to is *Smith v. Hubbs*, 1 Fairf. 71, decided in 1833, by the supreme judicial court of the state of Maine. The action was assumpsit for goods sold by the plaintiff to the defendant's intestate, Hubbs, under an arrangement between both parties with one Weymouth, that he should take the goods in question, with other goods, and open a shop, and sell them out under the name of the intestate, which was lent to cover the goods against Weymouth's creditors. After the plaintiff had proved the sale and delivery of the goods, the defendant was allowed to show the object for which he purchased them,

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as a defence; and to make out his case by Weymouth, the fraudulent go-between, as a witness. The jury having found for the defendant, on a motion for a new trial, several questions were made: 1. Whether Weymouth was competent to prove his own turpitude: 2. Whether the matter could be shown as a defence, or whether such a defence must not be confined to a case where the plaintiff himself discloses it by his own evidence. The validity of the defence, when once legitimately introduced and established, appeared to the plaintiff's counsel to be so obvious, that it was not much contested. But a question was made upon the weight of evidence whether the fraud was established, admitting Weymouth to have been a competent witness. The motion for a new trial was denied. Mellen, Ch. J. who delivered the opinion of the court, cited at length the language of Lord Mansfield as I have stated it; but mainly with the view of showing that the matter of defence might as properly come from testimony on the one side as the other; in either case it would be fatal to the action. Still, speaking in reference to that question, he makes several remarks directly pertinent to the legal foundation of the defence. His words are these: "There is a marked and settled *distinction* between *executory* and *executed* contracts of a *fraudulent* or *illegal* character. Whatever the parties to an action have *executed* for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally *contracted to execute*, the law refuses to compel the contractor to execute, or pay damages for not executing; but in both cases leaves the parties where it finds them. The object of the law in the *latter* case is, as far as possible, to prevent the contemplated wrong; and in the former to punish the wrong doer by leaving him to the consequences of his own folly or misconduct." A due degree of pains seems to have been bestowed upon this case by counsel; and much consideration by the court which decided it. The decision is moreover entirely in accordance with the principles, the distinctions, and, as I think, the direct illustrations which I have sought to deduce from other cases. From the absence of direct authority in the reported arguments of

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both the counsel, as well as the opinion of the chief justice, the case too being so recent, I am led to suppose that my own search for other cases has been baffled by the real barrenness of the books rather than by the want of due diligence on my part.

When I said that *Smith v. Hubbs* was the only case I had met with at law, in which the principle *melior est conditio defendentis* had been applied or considered in a case such as we have before us, I was, as it will be remembered, aware that the supreme court of Indiana had in *Findley v. Cooley*, 1 *Blackf. R.* 263, *A. D.* 1823, decided exactly such a case, and repudiated the defence here set up. The action was brought by Cooley, against Findley, on several promissory notes, in the circuit court; and the defendant pleaded specially, that they were executed by him to the plaintiff as the consideration of land conveyed by the latter to the former with intent to defraud a Mrs. Walden of her damages in a pending action of trespass against the plaintiff. On demurrer, judgment was for the plaintiff in the circuit court, and on error by Findley, Blackford, J. delivered the opinion of the supreme court. He said the great defect in the pleas was, that it was *not a creditor* of the vendor, but a *party to the conveyance* who complained of its being fraudulent and void; and he proceeded to show, what I admit cannot be controverted, that fraudulent conveyances have always been considered binding on the parties. He then discusses the question, as I before mentioned, whether the statutes of either the 13 or 27 Elizabeth have at all altered the rule as between the parties; and infers that they have not; against which I am sure he was right in saying, there is not so much as a dictum. He adds, "We barely refer to some of the authorities, to remind the counsel for the defendant that, if the statute of Elizabeth does not authorize his client to *treat as void this conveyance to which he was a party*, which was admitted on the argument, his appeal to the principles of the common law is beyond the possibility of success." The authorities referred to were those which held the *conveyance* good at common law as between the parties. Thus the defence was argued and decided on the effect of the *conveyance* which

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was the *executed contract*, and not the notes which were the *executory contract*. And it was in respect to this, that I said the rule *potior est*, &c., had not, as between such parties, been applied or considered. The rule is not once alluded to in any form. Had the attention of the learned judge who delivered the opinion been turned, as that of Mellen, Ch. J. was, in *Smith v. Hubbs*, to the remarks of Lord Mansfield, I can hardly doubt that he would have concurred with the chief justice. With deference I repeat, the question was not whether the *fraudulent deed* was valid. In what sense was that good? By accident, says Lord Mansfield; not for the purpose of operating as a consideration, for the very conveyance was immoral and illegal, as much so as if the consideration had been prostitution. Suppose the tea contract in *Holman v. Johnson* to have been a fraud on the revenue; the law would not, according to Lord Mansfield, have set aside the sale of the tea, had the parties changed sides. But yet it would have afforded no remedy for the price, and it would have denied both, because *ex turpi causa non oritur actio*.

In *Stewart v. Kearney*, 6 *Watts*. 453, 5, Gibson, Ch. J. says of a sale to defraud creditors, "The law not only sustains the contract when *executed*, but *enforces it when executory*." But the sale in question was executed, and trover brought by the vendor to recover the goods. The case he cites for *enforcing* the contract, *Montefiori v. Montefiori*, 1 *W. Black*. 364, went on another principle—that of *estoppel in pais*. When Lord Mansfield there says, "No man shall set up his own iniquity as a defence, any more than as a cause of action," he must be understood as confining his remarks to a defence against an *innocent party*. Such was the case before him. The defendant had given his note to the plaintiff, his brother, to enable him to draw in a female to marry him, which she did. The note falsely acknowledged a large value in the defendant's hands, and enabled the plaintiff to succeed in his designs upon the female by representing himself as a man apparently of large fortune. In a suit by the husband the court held the defendant to his note for the benefit of the innocent female. It is put on the same ground as if the fortune repre-

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sented to exist had been settled on the female by marriage articles ; and it is said, in either case, the suit must be in the husband's name. To take the general doctrine unqualifiedly as there laid down, would contradict the whole current of English authority, and several cases decided by Lord Mansfield himself. The doctrine is also too broadly laid down in *Potter v. Yale College*, 8 Conn. R, 52, 62 ; indeed as broadly as would be the proposition just examined. The cases there cited, of *Philips v. Biron*, 1 Str. 509, and *Smith v. Bouchier*, 2 id. 993, are merely that where two join in pleading a justification, the matter must be a good justification for both, not for one only ; otherwise the plea is bad.

The point before us has been lately examined on the equitable side in the court of appeals of Kentucky. *Jones v. Read*, 3 Dana, 540, A. D. 1835. There a debtor, Mary May, in order to cheat her creditors, conveyed to her daughter Lucy, taking back a secret bond for re-conveyance. Lucy married, and her husband sold the land to Read, who gave his note for the purchase money, but filed his bill to avoid it, because the bond raised an adverse equitable claim in the obligee. Ewing, J. delivered the opinion of the court. He said the bond was fraudulent in its emanation ; and a chancellor should not interpose to afford relief to either party. No authorities are cited ; but the case is evidently an application of the principles which I have supposed to govern. It is more pertinent, as the mother's assignee was made a party defendant, and insisted on the bond as valid. The principle is also fully stated and approved in a case at law in the supreme court of North Carolina, by a *dictum* of Ruffin, J. in *Waller v. Niles*, 3 Dev. 519. On the same principle a court of chancery refused, as between the parties to such a fraudulent deed absolute on its face, to change it into a mortgage, pursuant to the agreement of the parties. *Wright v. Wright*, 2 Litt. R. 8, 12.

From the degree of examination I have been enabled to bestow upon the subject, I can not bring myself to doubt, that the note in question is among that class of contracts which the law will

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not enforce, on account of their corrupt origin. I am sure it is in vain to speculate, *ab inconvenienti*, whether such a result will, being known as the law of the land, have an influence either to discourage or multiply such fraudulent practices. To say that notes given upon such a consideration as this shall be enforced, was acknowledged by the plaintiff's counsel to be without any precedent which they could produce.

It is said the defence can be allowed only where the facts must necessarily make a part of the plaintiff's own proof, and for this we are referred to what Gibbs, Ch. J. said in *Simpson v. Bloss*, 7 Taunt. 249, 250. As this objection was very fully considered, and refuted on abundant authority, by Mellen, Ch. J. in *Smith v. Hubbs*, I shall content myself with referring to his argument there. The question put by counsel, (as if that would present an analogous case,) suppose that the defendant had paid the money, instead of giving his notes, could he recover it back? is the question, as it will be seen, to which we have fully directed our attention, and answered no; because that would be an *execution* of the contract, and drive the defendant, in the words of Lord Mansfield, to change sides. That makes the fatal difference. On the whole, my conclusion is, that there should be a new trial, the costs to abide the event.

Mr. Justice BRONSON, concurred.

The CHIEF JUSTICE dissented, and delivered the following opinion:

I am of opinion that the plaintiff is entitled to his verdict on the note in question, notwithstanding the want or illegality of consideration urged against it. In my view of the case, neither has been established; and to be satisfied of this, it seems to me only necessary to distinguish between an *illegal contract* in the strict sense of that term, and one *fraudulent* as it respects creditors. The former is altogether void, and cannot be made the foundation of an action. *Ex dolo malo non oritur actio*. "You

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shall not stipulate for iniquity," says Chief Justice Wilmot in *Collins v. Blantern*, 2 *Wils.* 341, "for no polluted hand shall touch the pure fountains of justice." This class of contracts is well assigned, and illustrated in the books. 1 *Comyn on Cont.* 31, 46. 2 *Saund. on Pl. and Ev.* 576, and cases there cited. They form an exception to the rule applicable in general to the dealings of mankind, namely, that no person shall take advantage of his own wrong. The reason for it is given by Lord Mansfield in *Holman v. Johnson*, *Cowp.* 343. "The objection," he observes, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff. If from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant." All this is quite clear and satisfactory.

But in respect to the other class, that is, contracts *fraudulent* under the statute, 2 *R. S.* 137, § 1; 13 *Eliza. c.* 5, they are void only "as against the persons hindered, delayed or defrauded:" not altogether void; they are binding upon the parties. *Cro. Jac.* 271. *Hawes v. Leader*, *id.* 270. 7 *Johns. R.* 167. 16 *id.* 189. When the question is between them, the rule *ex turpi causa* does not apply, and therefore, neither can urge the corrupt intent as to the creditors by way of impairing their obligation. Buttolph could not have urged this view in answer to a bill filed to compel the execution of the deed, nor the defendant resist taking it and paying the stipulated consideration.

My brethren have expressed the opinion that this rule is applicable only to *executed contracts*. But as early as the case of *Hawes v. Leader*, it was held otherwise. There one C. had sold certain goods to the plaintiff for £20 paid, and bound himself to keep them safely, and deliver them on demand. C. died some

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four years afterwards, and the plaintiff demanded the goods of the defendant, the administrator, who refused to give them up, upon which the action was brought. The defendant pleaded the statute of 13 Eliz. in due form, to which there was a demurrer, and judgment for plaintiff. It is there said the defendant is not such a person as is enabled by the 13 *Eliz. c. 5*, to plead that plea; for the statute makes the deed void as against creditors; but not against the party himself, his executor or administrator; against them it remains good. This has been, as I understand it, the received construction of this statute, ever since the decision of this case, (1608.) It is also reported in *Yelv.* 196. See also 3 *Bac.* 313, 314, *tit. Fraud, C.* 13 *Vin.* 520, *tit. Fraud, F.*, *pl.* 8 and 11. *Shep. Touch.* 67. 10 *Coke*, 57. 6 *id.* 19. 3 *id.* 82. 1 *Taunt.* 381. 2 *Barn. & Adol.* 376. 2 *Saund. Pl. and Ev.* 528.

It was said on the argument that the subsequent application of the property to the payment of the creditors, by operation of law, has changed the legal features of the case, as the vendor has thereby realized the whole benefit of the article sold, and the vendee of course has been deprived of it. Still this cannot make the contract illegal in the sense which renders it absolutely void, as the application is only the practical result of the *taint* before assumed to exist, notwithstanding which it was deemed valid as between the parties. As to the creditors, it was void from the beginning, and that is all that can be urged against it since the enforcement of their claims; for whatever of the fund may be left after satisfying them, belongs to the vendee as owner. He takes it by virtue of his title under the contract.

Again it is said, if the contract is not illegal so as to forbid the recovery, there is a *failure of consideration* arising from the interference of the creditors. This question depends upon the nature of the contract itself. If the title had failed upon an eviction by title paramount, the defendant could not have set up this by way of defence, unless there had been a warranty express or implied, or fraud on the part of the vendor; nor, which is the same thing, sustained an action to recover back the consideration



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paid. 2 *Caines*, 188. *Sugd. on Vend.* 337. *Id. on Sales*, 23, 24. 1 *Jac. & Walk.* 556. 3 *Munf.* 243. In the absence of either, the vendee is deemed to have taken upon himself the risk of the title as a part of his contract. But here has been no eviction by title paramount, and therefore it is quite immaterial what may have been the covenants in the deed, or representations at the time of the sale. Neither is any defect of title at the time of the sale pretended; indeed, we may say, from the ground upon which this defence is placed, it is conceded to have been good; for the only defect set up or relied upon, is one that arose out of the purchase itself, made by the defendant, and which implies that previously to that time the title was unexceptionable. Then, is there any general principle upon which the vendor can be made responsible for this ground of failure? There is certainly no covenant by him express or implied against the defect; and there can be no fraud, because we know that the eviction could not have taken place without proving that the vendee knowingly participated in that which has defeated his title. Without proof of such knowledge, there could have been no recovery against him. He took the title with full notice of the defect, and there is, therefore, no rule applicable to the construction of contracts which would make the vendor responsible under such circumstances. The case falls within the familiar principle, that imposes upon the purchaser the responsibility of any defects in the article of property whether real or personal, when he takes it with full knowledge, and without guarding against it by his contract.

The defects in such cases enter into the contract and are presumed to modify it by reducing the price of the article sold; in this way the purchaser provides for the risk, or diminished value of the goods. The land is sold with a cloud upon the title: and the goods as unmerchantable. The price is adjusted accordingly, and neither party has cause for complaint. I presume in the case under consideration the defendant provided for the risk against the claims of the creditors, by an abatement of the full value of the land; or if he did not, it was his own folly.

In any view that I can take of the case, the plaintiff is entitled

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to recover, though he stands in no better situation than Buttolph on all grounds : 1. That the contract is legal as between themselves ; and 2. There has been no breach of it shewn. This result is also in harmony with the soundest principles of public policy ; for were we to permit the purchaser in fraud of creditors to set up the intent with which the conveyance was executed as a defence to the payment of the purchase money, the fraud could be practised without hazard. All that would be necessary to escape it, would be to extend the payment so as to ensure the experiment by creditors, before it became due.

I am of opinion that a new trial should be denied.

A majority of the court, however, being of a different opinion, a new trial was granted.

New trial granted.

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DUBOIS vs. HARCOURT.

Where property is levied upon by virtue of an *attachment*, and subsequently a second levy is made upon the same property under another attachment, the officer making the second levy is not entitled to sustain an action of *trover* against a sheriff who illegally takes and sells the property.

Whether goods *attached* to answer to the plaintiff if he recovers, may be taken under a second attachment subject to the first, *quere*.

THIS was an action of *trover*, tried at the Ulster circuit in October, 1835, before the HON. ADDISON GARDINER, then one of the circuit judges.

The plaintiff claimed to recover \$110.26, the amount of an *attachment* held by him as a *constable* against the property of one Clow, he having by virtue of such attachment made a levy upon a quantity of firewood belonging to Clow, which was subsequently sold by the defendant. The defence set up was, that the defendant, as *sheriff* of the county of Ulster, had *previous* to

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the levy by the plaintiff, made a levy upon the same property by virtue of an execution issued out of this court, and had subsequently sold the same ; and that the avails of the sale were not more than sufficient to satisfy the execution. The levy made by the *sheriff* was in this wise : On the *fourth* day of August, 1834, after receiving the execution, he proceeded to the dwelling house of Clow and made an *actual levy* upon the household furniture and other property there present, and made an inventory of the same ; and with the assent of Clow, entered upon the inventory a quantity of firewood belonging to Clow, lying upon lots distant from the house of Clow—one a mile and a half, and the other five miles—and on the next day advertised the household furniture and the wood for sale. On the *fifth* day of August an *attachment* was delivered to the plaintiff to be served on the property of Clow, by virtue of which he proceeded to the premises where the wood was lying, and made an *actual levy* upon the same. Previous to the levy thus made by the plaintiff, the defendant did not go to the places where the wood was lying, nor did he see the same. A further defence was set up by the defendant, viz : that on the *fifth* day of August, and *before the levy made by the plaintiff*, a levy had been made on the same wood by one *Ray*, also a constable, by virtue of *attachments* against the property of Clow. On these facts the judge directed a verdict for the plaintiff, who accordingly found a verdict for the amount claimed. The defendant asks for a new trial.

*H. M. Romeyn*, for the defendant, insisted, 1. That the levy by the *sheriff* was a valid and sufficient levy, and gave the execution a priority over the attachment in the hands of the plaintiff ; and 2. If the levy was not sufficient for that purpose, that the plaintiff did not acquire such rights under the attachment in his hands as enabled him to sustain this action, inasmuch as the wood having been levied upon by *Ray* was in the custody of the law and could not subsequently be levied upon. 1 *Show*, 173. 17 *Johns. R.* 128. 10 *Peters*, 404.

*M. T. Reynolds*, for the plaintiff, contended that the wood was subject to a levy by virtue of the attachment in the hands of the

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plaintiff, notwithstanding the previous levy under the attachments in the hands of *Ray*, and cited 1 *Rolle*, 893, l. 40; *Comyn's Dig. tit. Execution*; C. 3, pl. 4. That if the objection existed, it could be urged only by *Ray*, between whom and the defendant no privity was shown. 10 *Wendell*, 389. That the policy of the law required that the action should be sustained, as otherwise junior attachment creditors might be deprived of their remedies. That in the present case, no injury could accrue to the creditors who had sued out the previous attachments, as the property was amply sufficient to satisfy all the attachments, and the plaintiff could not recover beyond the extent of his special interest. 8 *Wendell*, 447.

By the Court, NELSON, Ch. J. In *Ray v. Harcourt*, 19 *Wendell*, 495, it was held that an attachment from a court not of record, if actually levied, has a preference over an execution from a court of record in the hands of a sheriff under which such levy has not been made. That case disposes of the first question here presented; but another arises, viz. whether the plaintiff here can maintain this action, inasmuch as the property had been previously seized under other attachments, and at the time of the levy by him was in the custody of the law.

To maintain this action, a plaintiff must show, 1. Either an *absolute* or *special* property in the goods, the subject of the action, at the time of the conversion; and 2. A right to the actual possession. 12 *Johns. R.* 403. 2 *Saund. Pl. and Ev.* 869, 873. Now, although *Duboïs* may have had a special property in these goods by virtue of his levy under the attachment, which, however, is questionable upon authority, 1 *Show.* 174; 2 *Bacon*, 715; 10 *Peters*, 403, it is perfectly clear that he had no right to the possession at the time of the conversion by the defendant. *Ray*, the other constable, had attached the whole of the goods, and in judgment of law was in the possession of them, and had a right to the absolute control for the time being, as much so as if he had been owner. There may be some difficulty in securing the lien acquired by the second attachment upon the property; that is not, however, a question involved in this case, and it would be useless

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here to speculate upon it. It is impossible to give each officer the legal control of the property consistent with law or the right of the party making the first levy. Neither can these conflicting equitable claims growing out of several seizures, be adjusted in a court of law, without involving the interests of the parties in great confusion. Indeed, it is altogether impracticable.

New trial granted.

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STILWELL and wife vs. HUBBARD.

Where a deed of land executed in the presence of a commissioner authorized to take the acknowledgment of conveyances, who endorsed upon it a certificate of acknowledgment, was taken by the grantor into his possession, where it remained until his death ; it was held that it was inoperative for the want of delivery ; the grantee not having been present at the time of its execution, no formal delivery having been made to a third person, and the grantor by his declaration showing that he intended the deed should operate in the nature of a testamentary disposition not to take effect until his death.

THIS was an action of *ejectment*, tried at the circuit in the county of Kings in December, 1836, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The plaintiffs claimed to recover the premises in question by virtue of a deed executed by *Samuel Hubbard, senior*, to his daughter *Altie*, one of the plaintiffs. The defendant, who is the grandson of *Samuel Hubbard, junior*, claimed the premises under a devise to him contained in the will of his grandfather. Several years after the making of the will, and two years previous to his death, *Samuel Hubbard, senior*, went alone to the house of a witness for the plaintiffs, and told him that his daughter *Altie* was dissatisfied as to the disposition he had made of his property by his will, and that he had come to him for the purpose of making an alteration in the will, or of having a new one drawn, or having something done to pacify his daughter. The witness

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stated that after some conversation as to the competency of the testator to alter his will, he being very aged, it was concluded between them that a deed should be drawn, conveying to *Altie* twelve acres of land which had been devised to the defendant. The witness accordingly drew a deed conveying that parcel to *Altie*, which deed was executed by Samuel Hubbard, senior, in his presence, and being a judge of the county of Kings, he endorsed a certificate of acknowledgment upon it and delivered it to the grantor. The grantor asked the witness *whether the deed would give his daughter the piece of land after his death*, who answered that he thought it would. The witness testified that the impressions received by him were that the *deed was not to go into effect until the death of the grantor*, who was to keep the same until that event should happen. A son of the plaintiffs testified that upon a certain occasion, *Samuel Hubbard, senior*, said that if he (the witness) would give up a note which he held against him for \$102, he would give a deed of the premises in question to the *mother* of witness. Two or three weeks thereafter the grandfather came to the house of the plaintiffs and told his mother that he had procured a deed to be drawn to her, and that she could have it at any time that she wanted it. He at this time did not ask for the note, and the witness still retained it. On the other hand, it was proved that on the day that the will of Samuel Hubbard, senior, was opened and read, *Altie*, one of the plaintiffs, said that she *knew nothing about the deed*. After the death of Samuel Hubbard, junior, the *deed* and *will* were found in a trunk in which he kept his papers, and it was conceded by the plaintiffs' counsel that the *deed* had never been out of the possession of the grantor. The judge charged the jury that the deed was inoperative for the want of *delivery*, and that the plaintiffs could not claim title under it. The jury, notwithstanding, found a verdict for the plaintiffs. A motion was made to set aside the verdict.

*J. A. Lott*, for the defendant.

*N. B. Morse*, for the plaintiffs.

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*By the Court, BRONSON, J.* The deed was never delivered to nor accepted by Altie, the grantee, but remained in the possession of the grantor until the time of his death. *Jackson v. Phipps*, 12 *Johns.R.* 418. There were no formal words of delivery, and nothing was said at the time the deed was executed from which it can be inferred that Hubbard intended it should be a present operative conveyance. On the contrary, it plainly appears that he intended the deed should not take effect till after his death. In *Doe v. Knight*, 5 *Barn. & Cress.* 671, the grantor at the time of execution said to the subscribing witness, "I deliver this as my act and deed." He afterwards handed the deed to his sister, saying, "Here, Bess, keep this, it belongs to Mr. Gamons," who was the grantee. The jury found that the grantor parted with the possession and all power and control over the deed, and that the sister held it for Mr. Gamons, free from the control and disposition of the brother. The court held this a good delivery to a third person for the use of the grantee. On another point in the case, *Bayley, J.*, after referring to several authorities, said "It seems to me that where an instrument is *formally sealed and delivered*, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, *nothing to show he did not intend it to operate immediately*, that it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person for his use, is not essential. This is perhaps going as far as any of the cases, but it will not answer the purpose of the plaintiffs. In *Scrugham v. Wood*, 15 *Wendell*, 545, the conveyance was to trustees, of whom the plaintiff, who now claimed against the deed was one, and the trustees covenanted to execute the trusts. The deed was executed and acknowledged by and in the presence of all the parties. The grantor had the deed recorded, and then deposited among his papers. There was no room to doubt that all the parties intended it should immediately take effect as an operative conveyance. The grantor, as well as the other parties, was interested in the preservation of the deed; and it was said, that the fact of its being in his possession did not, under the circumstances of the case, create any presumption against the idea that a de-

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livery was intended at the time of execution. In *Ruggles v. Lawson*, 13 Johns. R. 285, the grantor delivered several deeds to a *third person*, to be delivered to his children respectively in case he should die before making a will. The grantor having died without making a will, it was held that the deeds were good, and would take effect from the first delivery. But in the case at bar, there was no delivery to a third person. The grantor kept the deed himself. He did not intend it should be an operative conveyance so long as he lived ; and if it was his settled purpose that *Altie* should have the land after his death, he has not taken the proper legal means for carrying that intention into effect. We cannot uphold this deed without overturning well settled principles. There must be a new trial ; and as the verdict was against law and the charge of the judge, the costs must abide the event.

New trial granted.

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WOOD vs. HITCHCOCK.

A tender of money in payment of a debt to be available, must be without qualification, i. e., there must not be anything raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered ; and it was accordingly held, in this case, that the tender of a sum of money in full discharge of all demands of the creditor, was not good.

THIS was an application to the court to set aside a *report of referees*. The action was *assumpsit*, and the declaration contained counts for goods sold, work done, materials found, and in the common money counts. The defendant pleaded *non-assumpsit* as to the promises, &c. *except as to the sum of \$85*, and as to that sum a *tender* ; there was also a plea of set-off. On the hearing before the referees, the plaintiff offered to prove a demand for board, lodging and washing furnished for two sons of the



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plaintiff at his request. The evidence was objected to as inadmissible under the counts of the declaration, and was rejected by the referees. Proof was then given of an attempt at a settlement, in which the *plaintiff* produced an account and claimed a balance in his favor of about \$100; the defendant insisted that the balance due from him was only \$77: but in order to obtain a settlement of the accounts, offered to pay to the plaintiff the sum of \$85: which was refused to be accepted. The defendant then made a *formal tender* of the last mentioned sum *in full settlement and discharge of all demands which the plaintiff held against him*; which tender the plaintiff refused to accept. Besides the above, there was evidence of work done by the plaintiff for the defendant. The referees reported that the defendant *did not tender* the sum of \$85, *in modo et forma*, as alleged in the plea, and certified the sum of \$85 to be due to the plaintiff. The defendant moved to set aside the report.

*S. Stevens*, for the defendant.

*M. T. Reynolds*, for the plaintiff.

*By the Court*, COWEN, J. Very likely the defendant, when he made the tender, owed the plaintiff in the whole more than eighty-five dollars, but has succeeded, by raising technical difficulties, in reducing the report to that sum. Independent of that however, the tender was defective. It was clearly a tender to be accepted as the whole balance due, which is holden bad by all the books. 2 *Phil. Ev.* 7th ed. 133, 4. *Evans v. Judkins*, 4 *Campb.* 156. *Cheminant v. Thornton*, 2 *Carr. & Payne*, 50, and *Peacock v. Dickerson*, in a note, *id.* 51. *Strong v. Harvey*, 3 *Bing.* 304. *Mitchell v. King*, 6 *Carr. & Payne*, 237. The tender was also bad, because the defendant would not allow that he was even liable to the full amount of what he tendered. His act was within the rule which says he shall not make a protest against his liability. 2 *Phil. Ev.* 7th ed. 134. *Simmons v. Wilmott*, 3 *Esp. R.* 91. He must also avoid all counter claim,

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as of a set-off against part of the debt due. 2 *Phil. Ev.* 7th ed. 134. 1 *Chit. Gen. Pr.* 508. *Brady v. Jones*, 2 *Dowl. & Ryl.* 305.

That this defendant intended to impose the terms or raise the inference that the acceptance of the money should be in full, and thus conclude the plaintiff against litigating all farther or other claim, the referees were certainly entitled to say. That the defendant intended to question his liability to part of the amount tendered, is equally obvious, and his object was at the same time to adjust his counter claim. It is not of the nature of a tender to make conditions, terms or qualifications; but simply to pay the sum tendered as for an admitted debt. Interlarding any other object will always defeat the effect of the act as a tender. Even demanding a receipt, 2 *Phil. Ev.* 7th ed. 134, or an intimation that it is expected, as by asking "have you got a receipt?" will vitiate. *Ryder v. Townsend*, 7 *Dowl. & Ryl.* 119. The demand of a receipt in full, would of course be inadmissible.

The books are sufficiently nice as to the manner of a tender; but I think the case at bar shows that they are not so without reason. The person making the tender may avoid all implication against the idea of a qualification, or other circumstance destroying his tender; by making it in writing, and even negating that it is on any condition, or reserve, or intended to prejudice the plaintiff's farther claim. Considering the exactness of the cases, and the chances to infer something against the defendant from the cross-examination of the tendering witness, Mr. Chitty advises to that course, with other cautionary steps in this respect. He even goes so far as to give the form of a notice which shall disembarass the proceeding of all the clogs imposed by the cases. 1 *Chit. Gen. Pr.* 508, and note (i), *Am. ed.* of 1834.

The motion to set aside the report of the referees must be denied.

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Emmet v. Bradstreet.

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## EMMET'S administrators vs. BRADSTREET.

Where lands of a debtor are sold under execution, and a junior judgment creditor *redeems* them from the purchaser, such redemption is no bar to an action at law to enforce payment of the judgment, although the value of the lands redeemed far exceeds the amount of the judgment and the money paid on the redemption.

DEMURRER to plea. The plaintiffs declared in *debt* on a judgment obtained by the intestate against the defendant for \$20,000 debt, and \$36.17 damages, rendered in the term of February, 1824. The defendant pleaded, that on the 16th May, 1822, a judgment was recovered against her in favor of one George H. Newbold, for the sum of \$632.53, upon which judgment an execution was issued and delivered to the sheriff of Delaware, who by virtue thereof, on the 2d October, 1823, sold all the right, title and interest of her, the defendant, in and to an undivided moiety of a lot of land containing 1,050 acres, and in and to the whole of another lot containing 603 acres; that on the 1st January, 1825, the intestate in his lifetime, as a judgment creditor of the defendant, and by virtue of the judgment set forth in the declaration, caused the right, title and interest, of the defendant in and to the said two lots to be *redeemed*, and afterwards, on the third January, 1825, received and accepted from the sheriff of Delaware, a deed of the said premises in fee, the same being of great value, to wit, of the value of \$25,000, and this, &c., wherefore, &c. To this plea the plaintiffs put in a *general* demurrer.

D. Selden, for the plaintiffs insisted, that the plea was no answer to the declaration, inasmuch as the redemption of the lands is not an extinguishment of the judgment. The statute under which the redemption was had, does not declare that it shall be an extinguishment. When the redemption took place all right and interest of the debtor in the lands had ceased, the time for redemption by her having expired.

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 Still v. Hall.
 

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*J. L. Tillinghast*, for the defendant, contended, that as the judgment declared upon had been fully satisfied by a course of legal proceedings, provided by law to enable creditors to obtain satisfaction of judgments against their debtors, the plea ought to be sustained. In support of his argument he cited 7 *Coven*, 553; 1 *Id.* 456, 457 and 510.

THE COURT gave judgment for the plaintiffs, holding that the creditor by the redemption takes the title, and stands in the place of the *purchaser*, whose title as against the judgment debtor had become perfect previous to the time when the creditor obtained the right to redeem. The redeeming creditor is bound to extinguish intermediate liens, and so far forth the debtor is benefited; but the judgment of the redeeming creditor remains unaffected.

Judgment for the plaintiffs.

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 STILL vs. HALL.

*Interest* is recoverable on money due under a special contract, as where compensation for services is agreed upon at a specific sum per month.

In an action to recover compensation for services rendered, the employer is entitled to show, by way of recoupment of damages, loss sustained by him through the negligence of the employee.

THIS was an application to set aside a *report of referees*. The action was *assumpsit*. The plaintiff claimed to recover a balance of \$99.62, as due to him for his services as master of a sloop belonging to the defendant, which he had navigated on the Hudson river. His compensation was agreed upon at the rate of \$35 per month. No time of payment was specified. He had charge of the sloop from the spring until the navigation closed in the fall of 1835. The balance claimed was conceded to be due, but the defendant offered to prove in bar of a recovery, or in reduction of the plaintiff's claim, that in violation of his orders, the plaintiff, at the close of the navigation, laid up the sloop at a particular landing on the river, and in so doing was guilty of such negligence

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that the sloop was run into and sunk by the ice. This evidence was rejected by the referees, who made a report in favor of the plaintiff for the sum claimed, *together with interest*, amounting in the whole to the sum of \$106.20. The defendant moved to set aside the report.

*J. Van Vleck*, for the defendant.

*A. Jordan*, for the plaintiff.

*By the Court*, COWEN, J. It is well settled that interest is recoverable on moneys due upon a special agreement. *Feeter v. Heath*, 11 *Wendell*, 477, 484. *Williams v. Sherman*, 7 *Wendell*, 109. Interest runs from the time when the money falls due. *Williams v. Sherman*, 7 *Wendell*, 109, 112. The referees were correct, therefore, in allowing it, unless the principal sum stood open for liquidation, by the testimony offered in abatement. If so, and damages had been proved and deducted, interest should not have made a part of the balance found. The principal would have stood in the light of an uncertain demand, to be settled by process of law. On such demands interest is not allowed.

We think the defence offered was admissible. It was not presented as a matter of set-off arising on an independent contract, but by way of recoupment of the plaintiff's damages, by reason that he himself has not complied with his cross obligations, arising under the same contract. The law implied an obligation on his side, as parcel of the contract in question, to exercise ordinary care in the defendant's service; and damages for not fulfilling that obligation are properly admissible in abatement, within the principle of *Reab v. McAlister*, 4 *Wendell*, 483, 492, and cases there cited: 8 *Wendell*, 109, *S. C.* on error.

The report must, therefore, be set aside, the costs to abide the event.

BECKMAN and wife *vs.* HUDSON.

Under a clause in a will in these words, "I ordain that my beloved wife Lanah shall have the care of my farm as long as she remains my widow, for her support and maintenance, and (that) of my children and mother," was held to give her an interest in the land *durante viduitate*, notwithstanding a subsequent clause giving the same premises to the children *in fee*.

THIS was an action of *ejectment for dower*, tried at the Rensselaer circuit in September, 1836, before the Hon. JAMES VANDERPOEL, then one of the circuit judges.

The dower was claimed in right of the wife, one of the plaintiff's, as the former widow of *Moses Van Buren*, in certain premises devised to him in and by the last will and testament of his father, *John M. Van Buren*, bearing date 18th September, 1799. The will contained the following provisions: "*First*, I ordain and direct that all my just debts and funeral charges be paid by my executors hereinafter named; *secondly*, I ordain that my beloved wife Lanah shall have the care of my farm as long as she remains my widow, for her support and maintenance and of my children and mother; *thirdly*, I give and bequeath unto my two daughters Catharine and Jessy and to their heirs and assigns forever, each one hundred acres of land from the east part of my land. All the remainder of my real estate except 35½ acres adjoining, &c. [locating the premises excepted] I give and bequeath to my son *Moses* and to his heirs and assigns forever." The testator died in 1799, leaving his mother, his wife and his three children surviving him. His wife remains unmarried, and the defendant in this cause is in possession of the premises in which dower is claimed, under her. The mother of the testator, after his death, was supported by his wife. *Moses* died in 1817, shortly after coming of age. On these facts a verdict was found for the plaintiff, subject to the opinion of this court.

*J. D. Hammond*, for the plaintiff.

*S. Stevens*, for the defendant.

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Beekman v. Hudson.

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*By the Court*, NELSON, Ch. J. If the widow of the testator took an *interest* in the farm *during her widowhood*, the plaintiff cannot recover, as her former husband was in such case not seised of an estate of inheritance, conferring the right to the immediate freehold. *Perkins*, § 340. *Park on Dow. ch. 4, p. 47.*

It is quite clear upon the words of the will above referred to, that the testator intended to give to the widow the exclusive possession and control of the farm, to enable her to receive the rents and profits of the same for a specified purpose, namely, the maintenance of herself and family. The provision thus made for the children during widowhood, as well as the duty imposed thereby upon the widow, seems necessarily to exclude all idea of an immediate estate in the premises going to the children. Upon any other view this clause of the will cannot possibly be carried into effect; for if the widow of Moses is entitled to dower in his share, on the ground that an immediate estate in possession was devised which confers upon her the right to claim an assignment of dower, the two daughters are equally entitled to the possession and enjoyment of their portions. Thus the widow of the testator would be deprived not only of the care of the farm, but of the means of supporting herself and family.

The children must all have been young at the date of the will, which was shortly previous to the death of the testator, and necessarily dependent upon their mother, and it was obviously his design to place the property exclusively under her control, with a view to enable her to bring them up; the means are therefore confided to her care, and the duty expressly enjoined. Nothing can be clearer, in my judgment, than the devise to her of the direction and management of the farm, together with the rents and profits during her widowhood. This is the plain intent and legal effect of the words; any thing short of it would defeat the whole plan of the testator. How could she otherwise maintain herself and children during widowhood?

In *Parker v. Plummer*, *Cro. Eliz.* 190, the words of the will were, "saving that I will that my wife shall have half the issues

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and profits of the land during her life, bearing and allowing half the charges thereof," &c. The question was whether the wife had any interest in the premises, or was only to have an account of rents, &c. It was determined that she had an *interest*, for to have the *issues and profits* and the *land* were all one. So in *Kerry v. Derrick*, *Cro. Jac.* 104, the words were, "as concerning the disposition of all my lands and tenements, I bequeath the *rents* of W. to my wife for life," &c. It was held that the *land* passed; that the words were apt enough to convey it according to the usual mode of speaking, naming the land by the rents. And in *Stewart v. Garnett*, 3 *Sim.* 398, Vice Chancellor Shadwell held that the "moiety of the rents, issues and profits of my estate," conveyed the fee, declaring that a devise of these was the same as a devise of the *estate* itself. See also *Rob. on Wills*, 401, 402, 529; 1 *Salk.* 228; *Ram on Wills*, 45; 1 *Johns. Ch. R.* 499; 1 *Ves.* 170, 533; 4 *Kent's Comm.* 536.

Judgment for the defendant.

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 BRADEN vs. BERRY.

A notice by a *turnpike inspector* that a turnpike road is out of repair, to subject a gate-keeper to a penalty for taking tolls after an order to throw open the gate, *must specify the part of the road* which is out of repair, unless the *whole road* be out of repair, and in that case it should be so stated in *totidem verbis*.

ERROR from the Greene common pleas. Berry sued Braden a *keeper of a gate on a turnpike road* in the county of Greene, to recover a penalty of *ten dollars* for demanding toll from him in passing the gate kept by the defendant, when the same was ordered by an inspector of the road to be thrown open, on the ground of the road being out of repair. See provisions of the statute on the subject, 1 *R. S.* 583, 2d ed. § 39, &c. The suit was brought before a justice of the peace. The plaintiff proved the demand and payment of toll on the 21st of January, 1837, and pro-



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duced in evidence a *notice and order*, issued by an inspector of turnpikes of the county, the first dated the *seventh* and the *second* the *twentieth* of January, 1837. The first was in the following form : "To William Braden, toll collector on the Hunter turnpike. Sir, On complaint being made to me the undersigned, inspector of turnpikes for the county of Greene, that your turnpike is out of repair, I have examined the same and found the complaint just. You are therefore to have the same repaired in three days from the date of this notice." Signed &c. The order, after reciting the notice, stated, that a second examination had been had, and that it was found that the road had not been repaired ; it then proceeded to direct the gate-keeper to open the gate and not to take toll of any person until he should receive a certificate from an inspector that the road was in proper repair.

The notice and order were served on the days of their dates. The justice rendered judgment for the penalty and costs of suit, which judgment was *affirmed* by the Greene common pleas on *certiorari*. The defendant sued out a writ of error.

*A. Jordan*, for the plaintiff in error.

*Powers & Day*, for the defendant in error.

*By the Court*, COWEN, J. The only question is whether the *notice* required by the statute was sufficient to subject the defendant to the penalty ; and we think it was not.

The notice should have specified that part of the road which the inspector had examined and held to be out of repair. If the whole and every part of the road had been found to be so, that should have been stated in so many words. The notice was equivocal. The statute intended to secure to the collector the opportunity of repairing the road intermediate the notice and final order, and shewing such repair for cause. All the notice said was, "complaint has been made that your turnpike is out of repair, and I have examined and found the complaint to be just." A case of actual and total dilapidation is an extraordinary one,

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and calls for language stating the fact in terms. In common parlance it would not be intended by the phrase used in the notice. People hardly ever mean when they say a road is out of repair or in bad repair, or the like, that every rod of it is entirely so. To make it thus total, the words must be forced beyond their ordinary import. The notice should have been certain at least to a common intent. The provisions of the statute all look to the imposition of a penalty, and must therefore be strictly pursued.

The notice was defective, and the judgment is therefore reversed.

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 FIDLER vs. DELAVAN.
 

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Where a publication treats of the manner in which a particular business is conducted by two individuals carrying on business under the name of a firm, and one of the members of the firm brings a suit alleging the publication to be a *libel of and concerning him in his trade and business*, and that its object is to impoverish and ruin him, a *plea of justification* is an admission that the plaintiff is one of the firm mentioned in the publication.

A *plea of justification* to a declaration for a libel must justify the publication according to the sense given to it by the plaintiff; it is not allowed to repeat the charges and aver them to be true, though amplified by the addition of times, places and circumstances. The charges must be *directly* met, and not argumentatively or by inference.

A plea setting forth *the evidence of facts*, instead of the facts themselves, is bad.

A plea of justification *admits* the truth of the *innuendoes* as contained in the declaration.

DEMURRER to plea. This is an action for a *libel*. The publication alleged to be libellous is the same upon which the suit of *White v. Delavan* was brought, reported in 17 *Wendell*, 49, *et sequitur*, where will be seen the publication. The same matters alleged by way of inducement in that case were alleged here, with the additional allegation that the *plaintiff*, as one of the firm of *Fidler & Taylor*, in the publication mentioned, carried on the business of a *maltster*, and that the publication was *of and concerning him in his trade and business*, and that to injure and

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destroy his trade and business, and to vex, harass, impoverish and ruin him, the defendant did publish, &c. The defendant put in a *plea of justification*, to which the plaintiff *demurred*, assigning a variety of special causes of demurrer. For the objections urged to it by the plaintiff's counsel, and the view taken of the plea by the court, the reader is referred to the opinion delivered by the chief justice. The demurrer was argued by

*S. Stevens*, for the plaintiff.

*A. Taber*, for the defendant.

*By the Court*, NELSON, Ch. J.\* The pleadings admit that the plaintiff is one of the firm of Fidler & Taylor, and, therefore, that he is particularly designated in the alleged libel; the objection that he was one of a class referred to, which was successfully taken in the case of *White v. Delavan*, 17 *Wendell*, 49, does not apply. By pleading over, the defendant concedes the publication to have been of and concerning the plaintiff, &c. and puts himself upon the justification, *Cro. Car.* 288, 385; *Lutw.* 627; *Cro. Jac.* 668, 683; *Cro. Eliz.* 825, so far as defect of form may exist.

The main question then, in this case, is as to the validity of the pleas, which set up the truth in bar of the action. They must be co-extensive with the charge in the publication, and which is to be construed as it would be understood by mankind in general, giving to the words their ordinary meaning. Courts are not to understand it in a different sense from the general reader. The soundness of this rule of interpretation must be obvious, as it is the effect of the libel upon the *community* that constitutes the gravamen of the action.

We must enquire then, *first*, into the true meaning of the publication, as a proper understanding of it is essential, in order to enable us to test the sufficiency of the pleas. The pleader has explained his understanding of the publication by the innuendoes

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\* This case was decided in May term last.

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in the declaration, and they have not been denied ; they are admitted by default for want of plea, as was adjudged in the case of *Tillotson v. Cheetham*, 3 Johns. R. 56, and so on demurrer. Here the *general issue*, which would have put the plaintiff to the proof of the libel as declared upon, and required him to maintain the meaning as imputed by the innuendoes, has been waived ; all is admitted as set forth ; the defendant assuming the affirmative, seeks to shield himself by shewing the truth of the charge as thus spread upon the record. This view, however, is not important, as there can be no doubt about the true meaning of the publication, or that the one imputed in the declaration is correct. It is substantially as follows : That six or seven years ago (that is, previous to the publication,) the plaintiff caused his malting establishment on the hill in Albany to be supplied with filthy, putrid water, such as is taken from pools, gutters and ditches, in which were dead putrid animals ; that the water was often so foul and polluted as to be green on the surface, and nearly as thick as cream with filth ; that such water had been used by the plaintiff for several seasons in malting for his brewery ; and that steep-tubs used for that purpose, which usually contained seven hogsheads, had a deposit of ten or twelve inches of the most filthy matter, that settled to the bottom of them. This is the essence of the charge as laid in the declaration, as understood by the general reader, and which the defendant was bound to justify.

Now the first radical defect in the pleas is, that the pleader undertakes to justify the libel *literally*, without regard to its meaning or legal effect. For instance, it is set forth that on the 1st December, &c. Fidler & Taylor's malting establishment (meaning the one owned and possessed by the plaintiff and one Taylor) *was supplied* with water for malting from a stagnant pool, &c., without averring directly that the establishment was supplied *by the plaintiff*, or through his instrumentality, which is the evident sense of the publication. The whole scope of it leads to this conclusion. The plea therefore falls short of a justification as to this part of the charge.

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Another defect is, that the *evidence of the facts* charged is spread out in the plea instead of the *facts* themselves. This is a violation of one of the first rules of pleading, which requires a statement of the facts constituting the plaintiff's cause of action, or the defendant's ground of defence. 1 *Chitty's Pl.* 216. A plea should be direct and positive, and not by way of rehearsal or argument, which leads to prolixity and expense. 1 *Chitty*, 516. 8 *Cowen*, 728, 729. 15 *Wendell*, 656. The error of the pleader has arisen from not regarding sufficiently the legal effect of the libel, which is all that is necessary to meet and defend, and which must be defended. By reason of this error he has undertaken to justify in the terms and words of it. He has thus followed the language throughout, affirming the truth of all that is there stated, with little more than the additions of time and place. This has led to a tedious detail of the evidence, which might be necessary on the trial to establish the truth of the charges, but necessary there only. A particular description is given of the places mentioned in the libel whence the filthy water was taken, where collected and deposited in the malting establishment; that the water there used was taken from the several places, mentioning them, in which were at several times dead animals, &c. Now it is apparent that all this is but evidence of the facts intended to be charged upon the plaintiff, namely, *that he used in malting grain for his brewery, foul and polluted water, such as is taken from stagnant pools, &c. containing dead putrid animals.* Again, the plea states that water was *carried to the malt house* of the plaintiff, &c. of great thickness, to wit, as thick as cream with filth. This is but a *literal* justification of the charge; carrying the filthy water to the malt house simply, contained no imputation upon the plaintiff or his establishment, except by inference or argument. The pleas do not meet the sting of the libel, namely, that the water of this description was used *by the plaintiff* in the business of malting on the hill. This is the charge intended by the writer, from the language used, and the necessary inference to be drawn by the reader. It should therefore have been directly met, and not by

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way of "rehearsal and argument." The same observations are applicable to the next paragraph, "*that water passed on carts from the direction of the big pond,*" &c. By the language of the libel the writer intended to convey the imputation that such water was used *by the plaintiff* in malting—if not, then the libel contained no charge, and should not have been answered. Carrying water upon carts to the establishment was harmless.

The essence of the charge is comprehended in a few words, as we have already seen; and it is not necessary that the pleader should extend his justification beyond it. The error on this point has led to great and perplexing prolixity, which should be avoided, as its effect is to confuse and embarrass the issue and trial.

Judgment for plaintiff.

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*SPRAGUE vs. BLAKE.*

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Where a contract is made for the sale of an article of merchandize at a stipulated price, although the contract be void under the statute of frauds, the *price* agreed upon may be recovered, if the article be subsequently delivered and *accepted*.

A *subsequent* acceptance in whole or in part of the article agreed to be sold, renders the contract valid; though it *seems* it is not so as to the payment of earnest money.

Although by the terms of a contract an article agreed to be delivered is to be of a *merchantable quality*, still if an inferior article be delivered and *accepted*, the purchaser when called upon for payment is not entitled to a reduction from the contract price, on the ground of the inferior quality of the article; he must refuse to accept it, or if its inferiority be subsequently discovered, he must return it or require the purchaser to take it back.

ERROR from the Yates common pleas. Blake sued Sprague in a justice's court, and declared in *assumpsit* for wheat sold and delivered. The defendant pleaded the general issue and gave notice of set-off, and claimed damages for non-performance of the contract by the plaintiff. The plaintiff obtained a verdict in the justice's court, and the defendant appealed to the Yates common pleas. On the trial in that court, the following facts appeared. In the summer of 1835, the defendant agreed to purchase the whole of a crop of wheat belonging to the plaintiff,

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estimated to amount to between three and four hundred bushels, to be delivered at a particular place on the Seneca Lake, for which the plaintiff agreed to pay one dollar per bushel. A portion of the wheat had been threshed at the time of the bargain, was lying on the plaintiff's barn floor, and was examined by the defendant. It was agreed by the defendant that the wheat should be merchantable. Subsequently a part of the wheat was delivered at the place specified, *was received by the defendant* and paid for by him, and it was agreed between the parties that the *residue* of the crop should be delivered at the storehouse of one *James D. Morgan*, in Penn-Yan. In pursuance of this last arrangement the plaintiff delivered at the storehouse of Morgan 27 bushels and 48 lbs. of wheat, and for the delivery of this parcel the action was brought, the defendant refusing to pay for the same. *Morgan* was the agent of the defendant in receiving wheat in the summer of 1835. He was not present when the last quantity was delivered; it was received by his servants. On opening the first bags, one of them told the plaintiff the wheat was *bad*, and it would not do to empty it in with the rest in the storehouse; to which the plaintiff replied that they had seen his wheat and had bought his whole crop. The wheat was then emptied into a bin containing six or seven hundred bushels. The whole load was a mixture of broken wheat, black kernels, cockle and chess. The defendant offered to prove the *value* of the wheat delivered; this evidence being objected to by the plaintiff, the court decided that it was inadmissible under the *notice* given with the plea, and that no proof as to the value of the wheat could be received, except such as showed or tended to show that it was of no value whatever. A witness then testified that the wheat might be worth 33 cents per bushel. The defendant offered to prove that the wheat in the bin was rendered unsaleable by the quantity in question being mixed with it; this evidence was rejected by the court. It was proved that the wheat in question, together with other wheat, was taken away from Morgan's storehouse by the defendant's boatmen. A witness for the defendant testified that when

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the contract for the purchase of the plaintiff's crop was made, there was no note or memorandum in writing made of the bargain, nor was any portion of the wheat then delivered, nor was any money paid. The counsel for the defendant contended that the contract was void under the statute of frauds, and on this ground again offered to prove the *value* of the wheat, but the court refused to receive the evidence. The court charged the jury that if they were satisfied that the wheat was received by the defendant or his agent, they would find for the full contract price. The jury accordingly found a verdict for \$30.90. The defendant having excepted to various decisions made by the court, sued out a writ of error.

*J. S. Glover*, for the plaintiff in error.

*E. Van Buren*, for the defendant in error.

*By the Court*, COWEN, J. The court below were right upon the evidence in charging the jury, that if the wheat was accepted by the defendant or his agent, they must find for the plaintiff the whole contract price. This was the only question that was at all open for the jury. If there had been no acceptance no action would lie. If there was an acceptance, it was obviously connected with the special agreement, which fixed a price. It is said that was void by the statute of frauds. Be it so at the time; still it was good as a proposition of price, under which the plaintiff avowedly acted, and which the defendant did not revoke. He too, therefore, must be taken to have acted under it in receiving the wheat, unless the law would allow him to mislead the plaintiff by his silence. On a delivery, without any change of terms, even of part, a previous proposition to pay a certain price becomes binding. The part delivery need not by the statute, be made at the time of the contract. An oral agreement may stand for a mutually agreed proposition, and unless revoked, the subsequent acceptance of part of the goods which were the subject of the oral negotiation, will make it binding. The statute does not require that the part acceptance should be



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at the time of the oral contract, though it seems to be otherwise of earnest money which is to bind the bargain. 2 R. S. 70, § 3. The authorities upon the statute of frauds allow of an oral order at one day ; and an acceptance at another by the defendant or his agent. That completes the contract. *Hart v. Sattley*, 3 Campb. 528. *Vincent v. Germond*, 11 Johns. R. 283. The latter case went much upon *Chaplin v. Rogers*, 1 East, 192, which the court below seem to have followed in their charge. The case before them was much stronger for the plaintiff than *Chaplin v. Rogers*. The cases of *Jennings v. Webster*, 7 Cowen, 256, 262, 263, and *Outwater v. Dodge*, 6 Wendell, 397, 400, are also authorities, that a subsequent acceptance in whole or in part, under an oral contract, makes it good. These authorities cover the whole ground in question, unless indeed, there was a warranty or some fraud in the defendant. There being an acceptance, as the jury have found, and that being plainly at the agreed price, the question of recoupment for the inferior quality of the goods sold, becomes the same as if the action were brought by the defendant to recover damages. Fraud was not pretended ; and the doctrine of warranty on the sale of goods has been lately so much canvassed by this court and the court of errors, in *Hart v. Wright*, 17 Wendell, 267, that there is no need of going much into the enquiry in the case at bar ; whether there was a warranty express or implied. The court below gave the defendant the full benefit of the doctrine as it was understood by *Hart v. Wright*, if not more. There was here certainly no implied warranty ; and we clearly think no express warranty. It is true that the wheat was by the terms of the agreement, to be merchantable. That is understood of every such contract, even without express terms, while it is executory. When the party comes under such a contract to deliver an inferior unmerchantable commodity, which lies open to inspection, then is the time for the vendee to take his ground. He must then refuse acceptance, or at least, so soon as he discovers what the quality of the article is ; and offer to return it. When it is fully accepted, a new rule of construction arises. The executory contract is performed, no

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action lies upon that ; and no defence, therefore, can be based upon it ; but either must go upon an actual sale and delivery. The declaration on one hand, or notice of defence on the other, can no longer aver a contract *to deliver* a merchantable article, which had not been done ; but only that the vendor *had delivered*, and upon that delivery had agreed that it was merchantable. The acceptance is an assent that the terms of the executory contract were fulfilled. This distinction was also much considered in *Hart v. Wright*. *Vide* 17 *Wendell*, 277. It reconciles many cases which would otherwise appear to conflict.

It is said that in this case, the plaintiff's wheat was emptied into a large bin of better quality ; and the defendant could not, therefore, return it ; and damages are claimed for the manner of delivery. The plaintiff delivered the wheat at the place designated. It was opened and inspected by the receiver, who did object to its being mixed with the other wheat. Why did he not refuse absolutely to receive it, or direct it to be placed by itself, declining an absolute unqualified acceptance ? The plaintiff answered, "the defendant has agreed for all my wheat." It was mixed with the other, by the defendant's agent, and he afterwards boats it away. It cannot be insisted, after what the jury have found, that it was not accepted by the defendant's agent, and accepted generally. The defendant adopted all that the receiver had done. He takes and converts the plaintiff's whole crop, pays him for the main bulk ; but absolutely declines paying for a small portion received under the same contract at the same price with the other. We entirely approve of what Lord Ellenborough, Ch. J. said in *Fisher v. Samuda*, 1 *Campb.* 190, 193. There the defendants had ordered beer from the plaintiff, for the purpose of its being shipped to Gibraltar. On the arrival of the beer, it was discovered to be unfit ; but kept some time before there was any offer to return it. In an action by the vendee upon the executory contract *to deliver* beer fit to be shipped, and a breach in not delivering such beer, Lord Ellenborough said, "It was the duty of the purchaser of any commodity, immediately upon discovering that it was not according to order, and unfit for

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the purpose for which it was intended, to return it to the vendor, or to give him notice to take it back. Here, according to the plaintiff's own case, he knew certainly in *July* that the beer was unfit to be sent to Gibraltar, and there is no evidence of his having intimated this to the defendants before *December*, when the season for their exporting it was over, and when they might have lost the opportunity of disposing of it at home. Under these circumstances, the plaintiff must be presumed to have assented to its being of a good quality, and to have acquiesced in the due performance of the contract on the part of the defendants." In the case at bar, there was much more ; an acceptance and conversion.

The merits being still with the plaintiff, admitting that all had been proved which the defendant below offered, it is not necessary to inquire into the other questions which arose at the trial. As to damage for any wrong done by putting the wheat in the bin with that of a better quality, and thus injuring the plaintiff, such special damages clearly could not have been set off. They were not covered by the notice of set-off, and, indeed, the defendant's agents are rather the cause of the mischief themselves, in not directing another place for the wheat in question. This is said to have been done without the consent of the defendant. Not so. If the receivers were not his agents, why did he adopt their acts ? Campbell was his actual agent. He, too, inspected the wheat in the bin ; and the defendant's boatmen afterwards took it away. Davis, who was a sub-agent of the defendant, was present and actually participated in the delivery, without, as he says, inspecting the wheat particularly, though his attention must have been called to its inferior quality. He controlled the place of delivery.

The exceptions were not well taken, and the judgment must be affirmed.

## Beckman v. Traver.

## BECKMAN vs. TRAVER.

In a *plea of justification* by an officer for taking property in satisfaction of a rate or tax imposed by an *incorporated aqueduct company*, it is not necessary to aver the *organization* of the company; it is enough to aver, that by the act of incorporation, the original proprietors were *declared a body corporate and politic in fact*, if such are the terms of the act.

An averment that the *warrant*, by virtue of which the property was taken was *under the hand* of the officer issuing it, is sufficient, although the act authorizing its issuing requires it to be under the *seal* as well as the *hand* of the officer.

A declaration in *trespass* containing *two counts*, in each of which it is alleged that the defendant took and carried away a gig, is answered by a plea justifying the taking of the said gig in the *several counts* of the declaration mentioned.

DEMURRER to plea. The plaintiff declared in *trespass* for the taking of a gig. The declaration contains *two counts*, in each of which the taking of a gig is charged. The defendant put in a special plea of *justification*, alleging that by an act of the legislature, entitled "An act to incorporate the Hudson Aqueduct Company," passed 22d March, 1816, Robert Jenkins and four other persons, their then present and future associates, their successors and assigns, *were created and declared to be a body corporate and politic in fact*, by the name of "The President and Directors of the Hudson Aqueduct Company;" that the plaintiff on the 29th May, 1835, was, and for a long time before had been an inhabitant of the city of Hudson, and on that day used and for a long time before *had used the water* of the aqueduct belonging to the company; that the president and directors of the company imposed a rate or tax of \$11.11 upon the defendant for the use of the water; that payment was demanded of him, and on his refusal to pay, application was made to a justice of the peace for a warrant, who issued the same *under his hand*, directed to any constable of the city of Hudson, commanding him to levy the rate or tax of the property of the plaintiff; that the warrant was delivered to the defendant, a constable of the city, who by virtue thereof seized, levied and took the gig: which are the

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same *supposed trespasses* in the said *several counts* of the declaration mentioned ; and this, &c. wherefore, &c. To this plea the defendant interposed a general demurrer.

*J. W. Edmonds*, for the plaintiff.

*M. T. Reynolds*, for the defendant.

*By the Court*, NELSON, Ch. J. The act of incorporation provides that the warrant shall issue under the *seal* as well as the *hand* of the justice, and it is contended the declaration is bad for not averring the fact. To this it is answered that the term warrant implies a seal, and hence an averment was unnecessary. A warrant in a criminal proceeding at common law must be under the seal of the magistrate issuing it, 2 *Hawk.* 85, 136; 4 *Burns' Just.* 393; 4 *Black. Comm.* 291; and the fact would therefore be implied from the use of the term in such cases ; it would not be a warrant in the sense of the law unless sealed. This process, now frequently used in civil proceedings under various statutes, was taken from the criminal law ; and its import, as there defined, may well be regarded in its new office. Our statute has now dispensed with the seal in both civil and criminal courts in various instances. 2 *R. S.* 267, § 232. *Id.* 706, § 3. If we are right in this view, then though the plea alleges the warrant to have been issued under the hand of the magistrate, without the addition of the words *and seal*, still this does not necessarily negative that fact, if fairly implied ; as the term imports the seal, all that was material to aver was the issuing of the warrant by the magistrate as set forth ; the rest follows. The statute dispensing with the seal sustains this view of the import of the term ; for otherwise it would have been unnecessary.

It is also contended that there should have been an averment in the plea, that the *Hudson Aqueduct Company* had been organized. It sets forth that R. Jenkins and others, his associates, &c. were created and declared to be a body corporate and politic in fact, by the name of the "President and Directors of the Hud-

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son Aqueduct Company." This is sufficient. On recurring to the act itself, it will appear that this averment is not too strong ; that no steps were necessary to vest the company with corporate powers; or made a condition precedent to the right to impose and collect the tax for the use of the water.

The rate or tax was not to exceed nine per cent. on the moneys actually expended in making the aqueducts and furnishing the water, together with compensation to a few of their officers. The demurrer admits the furnishing of the water by the company and the use of it by the plaintiff ; and the right to the tax necessarily follows. The company is thus shown to be a corporate body, and a general performance of the services for which the tax may be levied. It certainly cannot be necessary to set forth the particular steps in the performance of the service.

It is further contended that the pleas profess to answer the whole of the declaration, but in fact answer only a part. The argument is this, that the plaintiff has counted for two gigs, and the pleas afford an answer but for one. I do not thus understand them. After setting out the proceedings in due form it is averred that the defendant, as constable, "*seized and levied upon the said gig in the several counts of the said declaration mentioned as of the goods and chattels of the said plaintiff,*" &c. thereby covering the trespass charged in each count. There are two counts, and the taking of one gig is charged in each. The pleader intended to justify the taking of each by the use of one and the same process ; and if the two might have been taken at the different times mentioned, under and by virtue of the same warrant, of which there can be no doubt, then the justification is complete ; each trespass is answered ; and the several takings were by authority of law.

Judgment for defendant.

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Vanderburgh v. Hull.

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## VANDERBURGH vs. HULL &amp; BOWNE.

A person employed as an *agent* in the conducting of a particular business, at a fixed salary, who by the terms of the agreement with his employers, was to receive in addition thereto, *one-third of the profits of the concern*, but not to be liable for any losses, was held not to be a partner, and therefore a competent witness in an action brought by his employers.

ERROR from the superior court of the city of New-York. This was an action of *assumpsit*, brought by Hull & Bowne against Vanderburgh, for iron castings. On the trial of the cause, Andrew Sherwood was called as a witness for the plaintiffs, who being sworn on his *voire dire*, testified that at the time of the making and delivery of the castings, he acted as the *agent* of the plaintiffs in the foundery conducted by them, at an annual salary of \$300, which was guaranteed to him by the plaintiffs, and in addition to his salary, it was agreed that he should have one third the profits of the foundery, if any were made, and that he had nothing to do with the losses. The plaintiffs found the capital, stock, &c., for the foundery, and he gave his services. This arrangement was made in February, 1834; in November of the same year, the witness bought the foundery and the debts due the plaintiffs, except this demand against the defendant, in which he testified he had no interest. No account was taken to see if there was any gain; they all knew to well that it had been a losing concern. The counsel for the defendant objected, that Sherwood was an incompetent witness, on the ground of interest; that from his examination it appeared that he was a partner with the plaintiffs, and should have been joined in the action as a co-plaintiff. Mutual releases were thereupon executed between the plaintiffs and Sherwood; and the chief justice of the superior court decided, that Sherwood was a competent witness; to which decision the defendant excepted. Sherwood was then sworn in chief, and gave material evidence for the plaintiffs, in whose favor a verdict was rendered. The defendant sued out a writ of error.

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G. C. Goddard, for the plaintiff in error.

E. C. Benedict, for the defendants in error.

*By the Court*, NELSON, C. J. It is perfectly clear, that *Sherwood* had not a joint interest with the plaintiffs in the foundry. The only ground upon which it was insisted that he was interested, and therefore incompetent as a witness, was that in addition to his salary, he was to have *one third of the profits* of the establishment, if any were made. The witness released all right to any profits, and thereby discharged his interest; and the only question is, whether he was a *partner*? On his *voire dire*, he declared, that by the agreement between him and the plaintiffs, he was not to be liable for *losses*. It appears to me, the case is not one of partnership, but falls within the class of cases where the share of the profits is given and intended as payment for the labor of the party. It is like the case of the *agent*, who received a proportion of the profits for his trouble, but had no interest in the capital, *Myers v. Sharpe*, 5 *Thunt.* 74; or the *broker* who received for his profit, whatever he could obtain above a stated sum on the sales, by way of remuneration for his labor, *Benjamin v. Porteous*, 2 *H. Black.* 590; or the *sailor* employed in the whale fishery, who received a certain proportion of the profits as wages, *Wilkinson v. Frasier*, 4 *Esp. N. P. Cas.* 182. See also 1 *Campb.* 331, *n.*; *Carey on Part.* 9, 10, 11; 4 *Maule & Selw.* 240. The wages of the witness were \$300 per annum, and a contingent interest in one third of the profits. He was not to be answerable for losses, which confirms the view that the arrangement was made simply in reference to the measure of compensation. He received a fixed sum in gross, with an increase upon a given basis and ratio.

Judgment affirmed.\*

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\* See the observations of CHANCELLOR WALWORTH upon this question, in *Champion v. Bestwick*, 18 *Wendell*, 184, 5.



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Sickles v. Mather.

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## SICKLES vs. MATHER.

The *account books* of a *manufacturer*, properly authenticated, are admissible in evidence, in an action by him against his customer, although entries were originally made by a *foreman* in the factory, if such entries were made only for a temporary purpose on a *slate*, and were from time to time *transcribed* by the principal into his day book.

An employee who attends to sales no farther than merely delivering goods manufactured, and keeping a memorandum of the delivery for a temporary purpose, is not a *clerk* within the meaning of the rule, requiring proof of the original entries. Where there are *mutual accounts* between plaintiff and defendant, an item of the account on either side accrued within six years next before suit brought, draws after it the accounts on both sides, and takes a case out of the operation of the *statute of limitations*.

ERROR from the New-York common pleas. Mather sued Sickles in *assumpsit* for goods sold and delivered. The defendant pleaded the *general issue and the statute of limitations*. The cause was heard by referees. The plaintiff, a *manufacturer of ink*, produced a bill of particulars, consisting of charges on nine different days, for divers quantities of ink sold to the defendant between the 12th day of January, 1830, and the 18th February, 1831, amounting in the whole to the sum of \$224.57. The suit was commenced on the 19th July, 1836, and only *four* of the charges, amounting to \$53.20, were of a date *within six years* previous to the commencement of the suit. The plaintiff called as a witness one *James Lightbody*, who testified that he was then, and had been in the plaintiff's employment as *foreman* in his factory for the last ten years, and had delivered all the ink that the plaintiff had sold within that time; that he had furnished the defendant with ink, which he had delivered at different times, and on one occasion in particular, he delivered 12 kegs of ink to go on board of a vessel. He could not recollect the particular month or year when he delivered ink to the defendant; could not swear positively to any of the items in the plaintiff's account nor could he say in what year the 12 kegs were delivered, but *thinks* he delivered ink to the defendant in the years 1830, and

1831. He further testified, that the plaintiff had not kept a *clerk*; that he (the witness,) kept a *slate* at the factory, upon which he made *memoranda* of the ink delivered, and that the plaintiff from the slate made his entries in a *day-book*; that the plaintiff used to take the slate home, sometimes every day, and sometimes every two or three days, as was found convenient for the purpose of transcribing. The plaintiff kept a day-book and ledger, all the entries in which were made by the plaintiff. The books were kept at the plaintiff's house near the factory. He (the witness,) had never made an entry in the books, which were produced and identified by him. Two other witnesses testified, that they had dealt extensively with the plaintiff, and had settled accounts with him from his books, which they had always found to be correct; and that he kept honest and fair books. The plaintiff's counsel offered the books in evidence, to the reception of which the defendant's counsel objected, on the grounds: 1. That *Lightbody* was to all intents and purposes within the meaning of the rule of evidence on this subject, a *clerk*, and therefore the books were inadmissible; and 2. That they were inadmissible, because the entries in the same were made from a *slate* kept by the witness at the factory. The objection was overruled, and the books received in evidence. A witness called by the defendant testified that he was an apprentice of the defendant from 1826 until 1831 or 1832, during which time, and until he left the defendant, he often saw *Lightbody* bring ink to the defendant's office. Another witness testified, that on the 12th March, 1830, he purchased of the defendant 12 kegs of ink, which the defendant had on that day received from the plaintiff; that he made the purchase to supply an order from the south. In the plaintiff's bill of particulars, there was a charge of 12 kegs of ink, under date of 12th March, 1830. The defendant also produced a bill of particulars before the referees, and claimed a *set-off*; two of the items of which were of the date of *March*, 1830, which were admitted by the plaintiff and allowed by the referees. The plaintiff's books contained an account as charged in his bill of particulars, except three items, which were not allowed by

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the referees. The plaintiff obtained a *report* for \$217.63, which the defendant moved the common pleas to set aside. That court confirmed the report of the referees, and rendered judgment for the plaintiff. The defendant sued out a writ of error, and the cause was submitted, on written arguments, by

*R. Lockwood*, for the plaintiff in error.

*H. Holden*, for the defendant in error.

*By the Court*, COWEN, J. It is not denied that if there were mutual accounts current, and any one item on either side was proved to have arisen within six years next before the suit brought, this will draw after it both accounts, and take the case out of the statute of limitations. Thus the inquiry here brings us, in some measure, down to the admissibility of the books of the plaintiff below. They contain dates within the six years; and if competent evidence, they are so as well in respect to the date of the sales, as of the sales themselves. It is to be noted, however, that both Lightbody and the defendant's witness Hall, gave evidence upon which the referees might well have been satisfied, that ink was delivered within the six years, so that we are not driven for time to the books alone.

The books were, however, essential to the main question in the cause; for there was no other adequate proof of the plaintiff's account. Were they admissible? It is said, first, that the plaintiff had a clerk; and if so, they were clearly inadmissible according to *Vosburgh v. Thayer*, 12 *Johns. R.* 462. Lightbody calls himself foreman, and says he never in his life made an entry in the plaintiff's books. This certainly does not look like his being a clerk. The object of the limitation doubtless was to withhold secondary evidence, with which the books alone must certainly be classed, until it shall appear that, at least, the party was without a regular clerk, whose business it is to notice the sales and make entries as they occur in the journal. He is then the only admissible witness. At any rate, this is so as to all the entries, unless it appear affirmatively that some of them were in

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fact not made by him. *M<sup>r</sup> Allister v. Reab*, 4 *Wendell*, 483. Several cases in states where the party's suppletory oath is allowed, exclude books as evidence of transactions, when it appears they were in fact known to third persons. Such a precaution would be of very little utility in this state, where the party is not sworn, and it is, therefore commonly impossible to learn that others could testify. Lightbody was not in any sense a clerk for the purpose of verifying the books. A clerk can connect them with the sales, (many of which he usually makes himself,) and his original entries, (to the general accuracy of which he can make oath,) become themselves evidence of what he may in fact have forgotten. *Merrill v. The Ithaca & Owego Railroad Co.*, 16 *Wendell*, 596 to 600, and cases there cited. It would clearly be going beyond the meaning of the qualification in *Vosburgh v. Thayer*, to say that a man about a factory who attends no farther to sales than the mere delivery of goods, and noting the fact for a temporary purpose upon a slate, should be esteemed the only competent witness to establish all the sales and entries of his principal.

Then as to the manner in which these entries were made. We have, with what degree of wisdom, time must determine, held that books of original entries made by the party, shall be evidence in his favor, under certain qualifications; and this whether he be a merchant, or engaged in any other business. We do not require nor allow his own oath, a practice I believe peculiar to this state and that of New-Jersey. Even if this be a hazardous species of evidence, as every one, I think must allow, yet, I am at a loss to perceive that the adoption of an exception which shall exclude entries from a slate, is of any importance towards diminishing the danger. In those states where the suppletory oath comes in, I know there are several cases for and against the reception of entries thus made. If there be any degree of protection against abuse in such a restriction, it has there, at least, the merit of being a more practicable one; for the party can be interrogated as to the manner of his entry. With us we have ordinarily no means of showing this, and the case must be one

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of a thousand in which it is disclosed. The witness who could speak to such a fact must in general, like the one in this case, be a third person who has made the slate memoranda himself. After all, perhaps the better considered cases are those that allow books in evidence which are made up from such memoranda, even where the party is a witness. So long as books are allowed at all, it is not very easy to perceive what great degree of additional accuracy or honesty we can give to them by forbidding the party to use a slate during the day, and transcribing from that into his book at night. It is a very common practice with men in all kinds of mechanical and other business conducted under circumstances which render the immediate use of pen, ink and paper inconvenient; and where such was found to be the ordinary course of the party, his books were received for that reason; *Faxon v. Hollis*, 13 *Mass. R.* 427; though where a journeyman was in the habit of making the entries on a slate, whence they were copied by his master after a long time, the manner was held exceptionable and the books rejected. *Kessler v. McConachy*, 1 *Rawle*, 441. Where one partner marked a sale of butcher's meat with chalk on his cart, and the other transcribed it on the return of the cart, the book was received on their oaths. *Smith v. Sanford*, 12 *Pick.* 139. So where a butcher's servant carrying out meat, marked the sales in pencil, which his master transcribed on his return. *Ingraham v. Bockins*, 9 *Serg. & Rawle*, 285. And see all the kindred cases in Pennsylvania, cited in *Forsythe v. Norcross*, 5 *Watts*, 332. Not to pursue the cases farther, it seems to me that the benefit to be derived from the qualification contended for by the counsel for the plaintiff in error, would not compensate for the great quantity of evidence which it would cut off even if we had the means of reaching it by testimony.

It is not denied by counsel that the plaintiff below was entitled to have his books received in evidence, under the limitations prescribed in *Vosburgh v. Thayer*; and we think he brought himself within that case.

The rule itself which receives the party's books, even with his

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oath, seems to be regarded as of questionable policy, if we are to judge from the language of the courts and the course of decision in several states where it prevails. In some they appear disposed to load it with a multitude of restrictions as to the kind of business in respect to which books are to be received, and the manner in which they are kept, and the probability that better evidence may be had, &c. The rule is undoubtedly a departure from the common law, and may be a dangerous one : but that is rather an argument for repudiating it altogether than attempting to mitigate its virulence by feeble palliatives.

The judgment of the court below is affirmed.

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It is not enough to justify the issuing of a *warrant* against a debtor on the ground of an *intent fraudulently to dispose of his property*, that he has executed a mortgage of a portion thereof, and refused to confess a judgment or to give security, declaring a determination to manage his property himself.

See dissenting opinion of Mr. Justice COWEN.

ERROR from the Montgomery common pleas. Lasscells sued out an *attachment* against Connell from a justice's court, on an affidavit made by him that Connell was indebted to him in the sum of \$45.46 on contract ; that he had demanded payment, which had been refused, and that Connell also had refused to give a judgment for the amount, saying, that his property, except some hay, was under mortgage, and that he wanted to have the management of his property himself. Lasscells further stated in the affidavit, that when he requested Connell to give him a judgment or security, he offered to give day of payment for six months, but that Connell refused, and immediately left him in a great hurry to place his property, as deponent believed, out of his hands, in order to prevent him from collecting his demand. He further added that from the conversation of Connell, and from his conduct, he *believed* that he would make such

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disposition of his property as to defraud his creditors. On this affidavit the justice issued an attachment, upon which certain property was taken, and subsequently rendered a judgment against Connell and issued an execution. The Montgomery C. P. on *certiorari* affirmed the judgment, and Connell thereupon removed the record into this court by writ of error.

*H. Adams*, for the plaintiff in error.

*D. Cady*, for the defendant in error.

*By the Court*, NELSON, Ch. J. The affidavit on which the attachment issued is defective. We might possibly have considered it sufficient to uphold the judgment until reversed ; but here is a direct proceeding to test its validity, and if sanctioned, must be a precedent for all future cases. We have heretofore rejected the *belief* of the party, and applying that rule to this case, but little more is left than the *refusal* to give a confession of judgment. It is said he admitted that there was a mortgage upon his property ; but that of itself is no evidence of a fraudulent disposition of it. So too the declaration that he wanted to have the management of his property himself, did not authorize the inference that he wanted it for the purpose of so managing it as to defraud his creditors. That is not the fair import of his language. We might as well dispense with the affidavit in these proceedings as to approve of the affidavit in this case. A party when allowed to be a witness in his own case, should be required to make out at least a *prima facie* case of an intent to commit a fraud. The judgment must be reversed.

Mr. Justice BRONSON, *concurred*.

Mr. Justice COWEN *dissented*, and delivered the following opinion :

The only serious question is whether the affidavit was sufficient ; for surely the constable has returned a service which was

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the very best for the defendant below. He delivered him a copy of the attachment personally.

I agree that the affidavit must state circumstances from which the justice may infer the intent to defraud creditors; and must not be a mere expression of *belief*, or *information and belief*, in the plaintiff. This is the outside of the cases which the counsel for the plaintiff in error has cited. *Tallman v. Bigelow*, 10 *Wendell*, 420. *Smith v. Luce*, 14 *id.* 237.

The affidavit when looked at as a whole, states a demand of \$45. That the defendant was on the day of its date at the deponent's house, refused payment, would not give a judgment, said his property was under a mortgage except some hay; that he wanted to have the management of his property himself; and on the deponent's offering to wait six months with security, the defendant refused and left in a great hurry. The deponent superadds his belief of the defendant's intention to put his property out of his hands to defraud his creditors; but let that pass. Upon the other circumstances, the justice believed there was such an intent, probably that it had already been executed in the main. After admitting a mortgage, but yet declaring that he wanted to manage his property, refusing all terms and hurrying away, I understand him as the justice did, going off to perfect what he was fearful might be so far an inchoate fraud. He had not yet got all his property out on mortgage. A little hay was left. That was to be put in the same position; but yet he preferred managing all himself. That he could do, under his notions of the law, by continuing his possession under a mortgage which he would call *bona fide*. Show me an insolvent debtor who talks of a personal mortgage and the continued management of his own property in the same breath, and I, for one, want no more as a ground of belief that he has already, or means to resort to a device so very common. The non-imprisonment act, 2 R. S. 202, § 293, 294, gives an attachment whenever a justice is satisfied on the facts and circumstances sworn to by the party, that the debtor has fraudulently assigned or disposed of his property or is about to do it. I collect from



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this evidence, that he had disposed of most of it, and intended so to dispose of the whole by mortgage or in some other way, and had kept or would keep possession. Otherwise, how could he manage it? Such a set of circumstances, we have again and again holden to be a fraud on their face.

But suppose the proof to have been slight, though to my mind it is entirely satisfactory: are we to reverse this judgment because it might peradventure not satisfy the mind of magistrates who would be found more scrupulous, who adopt a higher standard of human perfection, and entertain a greater distrust of appearances opposed to their own hypothesis? I do not understand such to be the law. Even on the merits we are not to reverse a judgment because the proof is slight. That was expressly held by this court in *Fisher v. Chandler*, 1 Johns. R. 505. The court said, "There was some evidence, though not sufficient perhaps to support the judgment. We have never gone so far as to say that where there is some evidence, *however light*, the judgment ought to be reversed." Again, in *Vosburgh v. Welch*, 11 Johns. R. 177, it is said the proof for an attachment *ought at least to be colorable; for proof means legal evidence*. To this I assent. But I can not hesitate to say that the proof here was much more than colorable. It was such that, had it been before a jury, it would have been at least the duty of the justice to have submitted it; and their finding both fraud committed and fraud intended, could never, in my opinion, be disturbed. I think, therefore, the judgment should be affirmed.

The majority of the court however being of a different opinion, the judgment was *reversed*.

## Halliday v. McDougall.

## HALLIDAY vs. McDougall and others.

*General reputation of a partnership*, existing between two or more individuals, standing alone and not offered in corroboration of facts and circumstances, is inadmissible in evidence to prove a partnership. Whether it be admissible, even as auxiliary evidence, *quere*.

A bill of exchange drawn in one state of the union upon persons residing in another, is to be treated as a *foreign bill*, and a *protest*, apparently under the seal of a *notary public*, made in the state where the drawees reside, need only be produced, and *proves itself* as to the *presentment* and *refusal*; and so also, *it seems*, as to the transmission of *notice* to the parties on the bill, if such fact be stated in the protest. Where the notary is *dead*, a sworn copy of the protest taken from his record book of notarial protests, together with the original protest, is abundant evidence of the presentment and refusal.

In an action against several as partners, although but one of the defendants be brought into court, if he appear and plead the *general issue*, the plaintiff is not entitled to recover, unless he establish a *joint liability* of the defendants.

ERROR from the superior court of the city of New-York. Halliday brought an action of assumpsit against J. D. Ansley, J. McDougall and W. J. Wightman as copartners, transacting business under the name of Ansley, McDougall & Co. The declaration contained a count on a bill of exchange bearing date 26th November, 1825, drawn at New-York by the defendants on a firm transacting business at Charleston, S. C. under the name of J. D. Ansley & Co. for the sum of \$750, payable to the plaintiff or order at thirty days after sight. The bill was *accepted* by the drawees, but when it came to maturity, it was *protested* for non-payment, of which due notice was given. There was a similar count on a *second* bill of exchange of the same date between the same parties, for the same sum, payable forty days after sight, which was also protested and notice given. Then followed the usual *money counts*. McDougall alone being arrested, appeared and pleaded the *general issue*. On the trial of the cause, it was proved that the name of the firm of Ansley, McDougall & Co., subscribed to the bills as *drawers*, was in the handwriting of J. D. Ansley, and the name of the firm of J. D. Ansley & Co., subscribed to the bills as *acceptors*, was in the handwriting of

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*W. J. Wightman.* The plaintiff produced two papers, purporting to be the *original protests* of the bills declared upon, signed by Thomas Morris, *notary public*, at Charleston—one on the 14th and the other on the 24th January, 1826—to which was affixed his notarial seal, and in which he certified that he had made demand of payment, that the same had been refused, and that he gave due notice of the non-payment of the bill and acceptance to the drawers and respective endorsers thereof. D. Alley, a clerk in the U. S. Branch Bank in New-York, testified that the protests produced in evidence were received at the Branch Bank in New-York from the Branch in Charleston; that *Thomas Morris* was for many years *notary* of the United States Branch Bank, in Charleston, and the Branch in New-York had for many years received his notarial protests from the Branch in Charleston; they had received hundreds of them, which all passed through his hands as clerk of the New-York Branch. The signature of Mr. Morris, as protesting notary, was recognized, and payments made under them; he thus acquired a knowledge of Mr. Morris' handwriting, though he never saw him write; and that he believed the signature to the protests produced to be his handwriting. A deposition of a son of Mr. Morris was read, in which he testified that his father died in 1828; that he was a clerk in his father's office; that the record-books of *notarial protests* of bills and notes formerly belonging to his father, are in the possession of the Branch Bank of the United States in Charleston, where they are kept as records; that he finds in such books the record of protests of two bills of exchange, which he has transcribed and transmits, (being copies of the *original protests* verified by Mr. Alley;) that it was the invariable custom of his father to send notice of protest to the endorsers of protested notes by the first mail succeeding the protest. The bills had been discounted at the Branch Bank in New-York, and on being returned protested, were paid by the plaintiff. Two of the defendants, viz. *Ansley* and *Wightman*, were members of the firm at Charleston. In July 1825, *Ansley* was in England, and there entered into an agreement in writing with *McDougall*, the other defendant in these words:

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"We engage to allow Mr. McDougall one fourth the profits of our trade by his becoming an active partner, or give him the option of having his expenses paid out and home. Should Mr. McDougall not be satisfied with his proportion of the profits arising out of the said concern, we shall allow him a salary of \$1200 per annum. Liverpool, 16th July, 1825. (Signed) *John D. Ansley & Co.*" In pursuance of this agreement, *McDougall* came to this country. *Ansley* had put up a sign at his place of business, of *Ansley, McDougall & Co.*, and previous to the arrival of *McDougall* here, it was generally reported that he had become a member of the firm of *Ansley, McDougall & Co.* After his arrival, he acted as a member of that firm; but as to his being a member of the firm of *J. D. Ansley & Co.* at Charleston, there was no evidence independent of reputation. In relation to *Wightman* being a member of the firm of *Ansley, McDougall & Co.*, there was no evidence whatever, other than reputation. When the plaintiff rested, the defendants' counsel moved for a non-suit, on the ground that there was no evidence that *Wightman* was a member of the firm of *Ansley, McDougall & Co.* The motion for a non-suit was denied. When the proofs were closed, the defendants' counsel renewed the objection, and requested the judge to charge the jury that the plaintiff could not recover, unless they were satisfied that he had shown that *Wightman* was a partner in the firm of *Ansley, McDougall & Co.*, and that *general reputation was not alone sufficient to establish such fact.* On the subject of *general reputation*, all that was said in the charge to the jury was the following: "If the jury should not be satisfied that *McDougall* elected to become a partner, then they were to find upon the evidence whether he held himself out, or knowingly suffered himself to be held out by others, as a partner, in such a manner as to induce the world to believe he was such a partner. If he did so, then he was bound as a partner by the acts of the firm to all persons, except such as might know that in fact he was not a partner. The jury, however, in considering the evidence on this head, must carefully lay out of view the acts or declarations of *Ansley*, or of any other person, before the arri-

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val of McDougall in the country, and also the reputation on the subject of the partnership prevailing before that time." The judge further charged the jury, that before the plaintiff could recover, they must be satisfied that *all the defendants were partners* in the firm of *Ansley, McDougall & Co.* The jury found for the plaintiff. The defendants' counsel having excepted to various decisions made in the progress of the trial, and to the charge of the judge, sued out a writ of error.

*D. D. Field*, for the plaintiff in error.

*J. W. Gerard*, for the defendant in error.

*By the Court*, COWEN, J. Assuming that all three of these defendants were members both of the *New-York firm* which drew in favor of the plaintiff, and the *Charleston firm* which accepted, the action is completely sustained against the defendants as acceptors. No presentment and notice were necessary. It is true, there is no count against them specifically as such; and this was made an objection on the trial; but the claim in the latter form is admissible under the common counts—a proposition so plain, that an objection for variance at the trial, and which has found its way into the bill of exceptions, is not now persisted in.

If the members of the New-York firm were not also members of the firm at Charleston, the defendants must be charged, if at all, as *drawers*; and this view raises the question of presentment and notice. In the latter view, we think the case presents no difficulty. This being a draft, the drawers and drawees of which resided in different states of the union, is a foreign bill of exchange. *Bucknor v. Finley*, 2 Pet. R. 586, 590. *Lonsdale v. Brown*, 4 Wash. C. C. R. 148, per Washington, J.; 2 Pet. R. 688, app. S. C.; *Townsley v. Sumrall*, 2 Pet. R. 170. *Cape Fear Bank v. Stinemetz*, 1 Hill, 44. *Brown v. Ferguson*, 4 Leigh, 37. And per Nelson, J. in *Wells v. Whitehead*, 15 Wendell, 530. The protest of the foreign notary, therefore, proved itself, and its contents are to be received as true. *Chitty on Bills*, ed. of 1836, p-

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642, *a. and cases there cited*. *Townsley v. Sumrall*, 2 *Pet. R.* 170. *Cape Fear Bank v. Stinemetz*, 1 *Hill*, 44. *Per Story, J. in Nicholls v. Webb*, 8 *Wheat.* 331. Clearly, this is so as to the presentment and refusal. *Id.* It is said, however, that notice is not the official business of the notary, and therefore, though that be stated in the body of the protest, the statement cannot be taken as evidence *per se*. This may be so, though certainly it is his usual course to give the notice, and is in practice esteemed his duty ; so much so that I question whether he would not be accountable for the omission, on simple proof of the note coming to his hands as notary. The protest generally states, I presume, that notice was given. Such was the form in *Cape Fear Bank v. Stinemetz*, and I see no other evidence in that case of notice. It seems to have been assumed by the counsel that if the protest were available for the presentment and refusal, it was equally so for the notice ; and Johnson, J. said expressly, " the protest is evidence of demand and notice to the drawer or endorser." 1 *Hill*, 45. Such too is the form in *Nicholls v. Webb*.

But suppose this to be otherwise, the notary was dead ; and the protests here each contained a memorandum of notice as well as presentment. It appears both in the notary's record book and in the original. The book was, I think, sufficiently proved, and the memorandum of notice was sufficiently specific ; as much so as that in *Nicholls v. Webb*, 8 *Wheat.* 326. It is said the record was not an original. This is of course so. A memorandum is not the original notice. But it is original as a memorandum, and receivable, whether made by the notary himself or his clerk. In *McNeill v. Elam, Peck*, 268, the notary's daughter was his clerk, and made the entries on his representation, and proved her father's habits of business. The entries were received to show notice. The clerk who made the entries testified to them, and so does the clerk here. *Wilber v. Selden*, 6 *Cowen*, 164.

But the original protest was well enough proved. That, in the view we are now taking, contained another memorandum of notice. Both were a kind of attestation made doubtless about

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the same time, to keep the transaction alive. The original protest comes in the notary's own handwriting, provided Alley's testimony was competent evidence. He had long been a clerk in the bank, and received and acted as agent of the bank on a great many such protests. This is, at least, equivalent to an ordinary correspondence by letters acted upon, *Johnson v. Daverne*, 19 *Johns. R.* 134, which it is not denied qualifies the receiver of the letters to give an opinion in court as to the handwriting of his correspondent. *Vide State v. Allen*, 1 *Hawks*, 6; *Greaves v. Hunter*, 2 *Carr. & Payne*, 477. *Vide also* 2 *R. S.* 212; *also* 8 *Price*, 653. Beside all this we have the promises of two of the alleged members of the firm, made after presentment, to pay the plaintiff's claim. This may be taken as aiding the presumption, at least, that due notice had been given. The general weight of authority is, as remarked by Chancellor Kent, that a promise to pay is alone sufficient evidence of notice, 3 *Kent's Comm.* 113, and the cases there cited; though in this state the balance is the other way. See the cases summed up by Savage, Ch. J. in *Jones v. Savage*, 6 *Wendell*, 660, 661. In the case at bar, however, if the original protest as such were entirely out of the way: and taking this to have been an *inland bill*, we have the strongest possible circumstantial proof of every thing necessary to charge the drawers. *Vide Doe, ex dem. Patteshall, v. Turford*, 3 *Barn. & Adolph.* 890. Thus far we have gone on the assumption that all three of the defendants were actually or constructively, for the purposes of this paper, identified either with one or both firms; and it is not denied that this fact is essential to the plaintiff's claim. He must establish it against all three jointly, the same as if they were all on the record and had pleaded the general issue. That plea by McDougall alone is equivalent to the same plea by each. Was the case sustained according to this requisition of the law?

Most of the questions of fact were, it is not denied, properly left to the jury. Some of these were, whether *McDougall* was a member of the *New-York firm*; and if so, whether the bills

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were issued by *Ansley* for the benefit of *Ansley & Co.*, or of himself alone, with the knowledge of the plaintiff; and if so, whether *McDougall* assented to their being issued. It is said that the plaintiff having given evidence that they were issued for the benefit of *Ansley & Co.*, and endeavored to show both firms the same, he must prove that *McDougall* was a member of that firm, and could not otherwise recover. Not so. His being a member of the firm which drew, was enough to bind him if he assented, even though the plaintiff knew that the money was not going to the benefit of *McDougall*'s firm, but to a stranger. By express assent, he gave the plaintiff the benefit of his name to the paper and cannot gainsay it. The judge accordingly left it to the jury to say whether *McDougall* was a member of the firm of *Ansley & Co.*, at Charleston; and also, whether *Wightman* was a member of the firm of *Ansley, McDougall & Co.*, in New-York. The first fact was essential to charge the defendant *McDougall* as acceptor; the last as drawer. A joint cause of action was to be made out against all three, whether they were to be regarded as drawers or acceptors. There was abundant evidence to connect *Ansley* and *McDougall* as members of the New-York firm, and enough to implicate *Ansley* and *Wightman* as members of the Charleston firm. But to connect all these defendants in both or either, there is nothing in the evidence, that I can find, *except general reputation*; and that, for aught that appears, never coming to the ears of either *McDougall* or *Wightman*. Let us first look at *Ansley & Co.*, the acceptors at Charleston. It is true *McDougall* came from Liverpool under an agreement with that firm to serve them as clerk, or act with them as a partner. He finds on his arrival a partnership sign at New-York, "*Ansley, McDougall & Co.*," and adopts it and goes on in that name. *Non constat*, unless by flying reports, that he ever agreed with *Wightman* that his (W.'s) name should make one of the firm here. *Ansley* had no power that we hear of, to take in a partner with *Wightman*. That he was himself connected as such certainly gave him no power. His signing the name of *Ansley & Co.*, to the proposition of partnership in

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Europe, could therefore have no effect in itself; nor could his agreement on returning to New-York. He and *McDougall* afterwards discontinued their sign and went to Charleston; but that could have been for no other purpose than to close up the business of the old firm there. A few days after their arrival, *Ansley* and *Wightman* alone issued a public notice of dissolution.

But if the jury concluded, as I think they must have done, that *McDougall* had no part in the concern at Charleston, the defendants were not acceptors; and the chief justice then leaves to them the alternative, whether *Wightman* was not a member of *Ansley, McDougall & Co.*, the drawers. In this point of view, he tells them correctly, that "before the plaintiff could recover, they must be satisfied that all the defendants were partners in the firm of *Ansley, McDougall & Co.*" The question of *Wightman's* connection with that firm was contested at every stage of the trial. At the close of the plaintiff's case, on his resting, the defendant moved for a non-suit, because there was not sufficient evidence to charge *Wightman* as a member of *Ansley, McDougall & Co.*; and there was no evidence to show that he was in fact a partner there, or ever held himself out as such. At the close of the whole testimony, the judge is requested to charge that *general reputation is not alone sufficient*. These objections are now repeated. I have examined the bill of exceptions, and am unable to perceive that the objections are ill taken in point of fact.

The question, therefore, is, *whether a partnership can be established by general reputation alone*. There are certainly several cases in this court where such evidence has been received without objection at the circuit, as auxiliary to other circumstances properly admissible. Such is *Whitney v. Sterling*, 14 *Johns. R.* 215. The court assign as a reason for receiving it, that there was no objection to it on the trial; and when they say the evidence was competent it must be understood that it was so because no objection had been made. Such testimony was again received and acted upon without objection, in *Gowan v. Jackson*, 20 *Johns. R.* 176; and the competency of such evidence, even

independent of other proof, was mentioned as undoubted, by the late Chief Justice Savage, in *McPherson v. Rathbone*, 11 *Wendell*, 98. But the question was not before the court; and the chief justice most probably had in his mind the cases in *Johnson*. Tilghman, Ch. J. said, incidentally also, in *Allen v. Rostain*, 11 *Serg. & Rawle*, 373, that general reputation was corroborative evidence, but was not sufficient standing alone. Very likely he made the remark on the authority of *Whitney v. Sterling*. Thus, taking those cases and dicta, which go the farthest, if we except the very general remark of Chief Justice Savage, they disallow reputation, except under qualifications, which do not exist in the case at bar. To what principle the distinction between reputation considered alone, and as incidental proof proper in itself, is to be referred, there is some difficulty in saying. Where a partnership has existed in fact, but has been dissolved, and a third person has yet dealt with one of the partners, and sues them all, insisting that he acted on the credit of the former concern, the question whether a partner who has retired shall yet be holden on a contract of the others may depend on his having been known as a partner, for the notoriety of the fact may have influenced the conduct of the plaintiff; and in like manner the notoriety of the dissolution at the time when the plaintiff gave credit, may be evidence against the latter. *Carter v. Whalley*, 1 *Barn. & Adolph.* 11. This case was followed in *Bernard v. Torrence*, 5 *Gill & John.* 383, 405; but such cases relate to the probability of notice of an admitted fact, to be inferred from public notoriety. To establish the fact itself of a partnership, several cases of very high authority deny that such evidence is receivable even in corroboration of independent proof. Such is the case of *Bryden v. Taylor*, 2 *Har. & John.* 396, decided by the court of appeals of Maryland. In the recent case of *Brown v. Crandall*, 11 *Conn. R.* 92, the supreme court of errors in Connecticut, after a very learned argument decided, in so many words, that "In an action against two or more persons as partners, general reputation, even in connection with other facts, is inadmissible in evidence to prove a

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partnership." White, J. after adverting to the cases and vindicating the rule that hearsay is never admissible of a fact which is ordinarily susceptible of other proof, shews very graphically but truly, the danger in practice of making a decision which should form a precedent for receiving such evidence. "A person of doubtful credit," says the judge, "might cause a report to be circulated that another was in partnership with him, for the very purpose of maintaining his credit. His creditors also might aid in circulating the report, for the purpose of furnishing evidence to enable them to collect their debts." It may be added, that independent of sinister misrepresentations, there is scarcely a question upon which common reputation is more fallible. A contract of partnership is, in its nature, incapable of being defined by laymen; and whether an apparent partnership be really so, or a contract of some other character, is often a most embarrassing legal question with the ablest lawyer. General reputation of the more ordinary contracts, the legal nature and effect of which are understood by men of business in general, would be a much more proper subject of proof by general report. This the law always rejects; and yet I am not aware that there is a necessity for a resort to such proof in the one case more than the other. The researches of counsel, and of the court, in *Brown v. Crandall*, come short of any English case; and the latest English writers on the law of evidence and partnership, equally fail to furnish any authority for inferring a partnership from what the world may say. So in respect to the fact of dissolution, common report cannot be received. *Goddard v. Pratt*, 16 *Pick.* 412, 433. Surely if England with all her commerce, has never let in this mode of establishing a partnership, we want no more evidence that it is at least unnecessary.

The testimony in the case at bar is not open to the observation made in *Whitney v. Sterling*, that it was competent because no objection was made. Its introduction was not opposed *in limine*, it is true; but its utter incompetency to implicate *Wightman*, standing as was alleged, and as we find it did, alone,

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was repeatedly urged upon the court. The objection was disregarded, and repeated exceptions taken. The proper course would have been to have ordered a non-suit on the motion for that being made, or to have done the same at the close of the testimony, should the judge have thought it a better disposition of the case, than directing a verdict for the defendants.

The court, we think, erred in putting the case to the jury on the question of *McDougall's* connection with *Ansley & Co.*, and especially on that of *Wightman's* connection with *Ansley, McDougall & Co.* The judgment must, therefore, be reversed; and a *venire de novo* issue from the court below.

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KORTWRIGHT vs. BUFFALO COMMERCIAL BANK.

An action of *assumpsit* lies against a moneyed corporation, for refusing to permit a transfer of its stock upon the books of the corporation, when by the act of incorporation such transfer is necessary to give validity to the transaction; *case* would lie, but *assumpsit* may be maintained.

A *certificate of stock* is transferable by a blank endorsement, which may be filled up by the holder by writing an assignment and a power of attorney over the signature endorsed.

Proof of usage as to this mode of transferring stocks is admissible; but independent of such evidence, authority to fill up the blank endorsement will be inferred.

A plaintiff in such case, is not limited to a recovery of the mere excess in the value of the stock above par, but is entitled to recover the full value of the stock at its highest price, between the time of the refusal to permit a transfer, and the time of the commencement of the suit.

THIS was an action of *assumpsit*, tried at the New-York circuit in November, 1836, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The action was brought for the *refusal* of the bank to permit a transfer to be made upon its books of 100 shares of stock, standing there in the name of *Pierre A. Barker*. On the first of October, 1834, Barker being the holder of a certificate of stock, signed by the cashier of the Commercial Bank of Buffalo, stating that he was entitled to 100 shares, of the value of \$100 each, in the capital stock of that bank, transferable only on the books of

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the bank by Barker, or his attorney on surrender of the certificate—sent the certificate, together with his promissory note for \$10,000, as collateral security, to one *Bartow*, who was at that time cashier of the Commercial Bank at Albany, to obtain a loan of \$10,000. Before transmitting the certificate of stock, he *endorsed* upon it his name, to which he attached a seal. On the second day of October, 1835, at the city of New-York, an agent of Bartow negotiated the certificate of stock above mentioned, and other stocks, by delivering the same to the plaintiff, from whom he obtained a loan of \$25,000. The plaintiff gave a receipt for the stocks received by him, promising to return the same on repayment of the \$25,000 with interest, on demand, after thirty days from the date of his receipt. Bartow absconded on the day that the plaintiff advanced the money, and the latter filled up the blank transfer, by writing over the name and seal of Barker an assignment, transferring the stock to himself, and constituting S. A. Sherwood attorney, to do all necessary acts to perfect the transfer. On the second of November, 1835, Sherwood went to the bank at Buffalo, and requested permission to transfer the stock, which was refused by the original stockholder, who was then acting as president of the Commercial Bank, on the ground of apprehended difficulty in respect to the *note* for \$10,000, which had been sent to Bartow as collateral security for the contemplated loan, and which had not been transferred to the plaintiff. On the trial, however, it appeared that Barker had obtained possession of the note, and that this suit was probably defended for the benefit of the Commercial Bank of Albany, who claimed that Bartow had gone off their debtor to a large amount. When Barker refused to permit the transfer on the books of the bank, he conceded that he had received the \$10,000 of Bartow, and offered to pay the \$10,000 to Sherwood, which was declined to be accepted. It was proved, that from *January* to *June*, 1836, the stock of this bank ranged as high as from 150 to 300 per cent, advance. A witness for the plaintiff testified, that he was acquainted with the business of transferring stocks, having been in that business twenty

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years, and that it was the universal usage in the city of New-York, and in other places, to transfer stocks by blank endorsements, or blank powers of attorney ; that he had been in the habit of transferring in this manner stocks of nearly all the states of the Union, and that stocks are frequently sent in like manner to England : to this evidence the defendants excepted. The judge charged the jury, that the plaintiff was entitled to recover, and that the rule of damages was, the highest price that the stock bore at any time *after* the demand for permission to make the transfer on the books of the company, and *before* the commencement of the suit. The defendants excepted also to the charge of the judge, and the jury found a verdict in favor of the plaintiff for \$13,536.35. The defendants asked for a new trial.

*R. Bates & S. Stevens*, for the defendants.

*S. Sherwood*, for the plaintiff.

*By the Court*, NELSON, C. J. The whole defence in this case may be said to rest upon a denial of the title of the plaintiff to the certificate of stock, together with an objection to the form of the remedy, and the measure of damages submitted by the judge to the jury.

It is contended, that the assignment on the back of the certificate of stock, from Barker to the plaintiff, and the power of attorney to Sherwood, were made without proper authority, and therefore, the demand upon the bank to enter the transfer on the books, was nugatory. The case presents a complete answer to this view. It appears that Barker endorsed his name, and affixed his seal on the back of the scrip, which was duly witnessed by Scrantum, the cashier, before it was enclosed to Bartow to obtain the \$10,000. This blank was afterwards filled up by the plaintiff, by writing over the signature the transfer directly to himself and the power of attorney to Sherwood ; all which, is in strict conformity with the universal usage of dealers in the negotiation and transfer of stocks, according to the proof in the case. Even

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without the aid of this usage, there could be no great difficulty in upholding the assignment : the execution in blank, must have been for the express purpose of enabling the holder, whoever he might be, to fill it up. If intended to have been filled up in the name of the first transferee, there would have been no necessity for its execution in blank ; Barker might have completed the instrument. The *usage*, however, is well established, and was fully understood by Barker, as he made the transfer in conformity to it ; and he, or those setting up a claim under him, should not now be permitted to deny its validity. The filling up, is but the execution of an authority clearly conveyed to the holder, is lawful in itself, and convenient to all parties, as it avoids the necessity of needlessly multiplying transfers upon the books.

It is contended, that the action should have been *case* instead of *assumpsit*. The former remedy no doubt would have been appropriate, perhaps the most appropriate, but the latter appears to be warranted by sufficient authority. *The King v. Bank of England*, Doug. 523. *Parbury and another v. the same*. *Ibid.* 526, n. 3 *Mass. R.* 381. 10 *Ibid.* 402. 17 *Ibid.* 503. 8 *Pick.* 98. 7 *Cranch*, 299. 2 *Kent's Comm.* 289, 291. *Angel & Ames on Corp.* 129. In the case of *The King v. The Bank of England*, the court refused a *mandamus*, to compel the bank to enter a transfer of stock on its books, on the ground, that an action would lie for a complete satisfaction, equivalent to specific relief; and afterwards *assumpsit* was brought, and the cause tried before Lord Mansfield, without any exception to the remedy. The above references will show, that that case has been very generally regarded as an authority in this country ; and that the action may be maintained against a corporation aggregate, for a default of the kind in question, upon the ground that all duties imposed on them by law, raise an *implied promise* of performance. It was not very material how the question was at first decided ; whether the remedy should be *case* or *assumpsit*, or either ; and being once settled, there can of course be no good reason for disturbing it.

The plaintiff is entitled to recover the full value of the stock. This is obvious by the view of Lord Mansfield, in the case of

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*The King v. The Bank of England*, as he there observes, that an action will lie for *complete satisfaction, equivalent to the specific remedy by mandamus*, which ~~was~~ there sought ; and for this reason he denied the application. The counsel for the defendants contend, that the plaintiff should recover only the *damages* actually sustained, and which they insist to be no more than the *excess* of price in the market, over the par value which might have been realized upon a sale and transfer ; this assumes the plaintiff to be still the owner of the stock. But the defendants have denied this ownership altogether, and all right and title to control it, or the profits arising from the same. They possess the means of *preventing* its use or enjoyment, and if the plaintiff should now recover only the loss occasioned by his inability to sell in the market, the remedy would obviously be incomplete. He might still be nominally in possession of the stock, but the enjoyment of it denied to him, unless we are to assume, in the absence of any change of intention on the part of the bank, that a second application for a transfer will be more successful than the first. Upon this limited measure of damages, the plaintiff might be kept in continual litigation at the volition of the defendants, or be driven to abandon his property.

New trial denied.



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 Willoughby v. Jenks.
 

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## WILLOUGHBY vs. JENKS.

Where a street is dedicated to the public, but the same has not been accepted or recognized by the local officers as a public street, whether the owner of a lot bounding on such street may be considered as having title *usque filum viae*, so as to entitle him to an action against another for digging the street opposite to his lot and removing the earth therefrom, or whether he has merely an easement or right of way in the street, *quere*.

At all events such a case presents a question of *title to land*, which cannot be tried by a justice's court or by the municipal court of Brooklyn.

Where an action of trespass *quare clausum fregit* is prosecuted in a justice's court, all proceedings there must be suspended on the defendant's putting in a *plea of title* or on its appearing by the plaintiff's own showing that title to land is in question.

Proof of actual possession of a lot adjoining a *street* shows a constructive title in the occupant to the soil *usque filum viae*.

But to give such title, the street must have been accepted by the public as such; although dedicated, if not accepted, it remains the property of the original proprietor, subject to the easement or right of way of the purchasers of lots adjoining the street.

ERROR from the Kings common pleas. Jenks sued Willoughby in the municipal court of the city of Brooklyn, and declared against him in *trespass*, for digging up the soil and destroying the grass and herbage of the plaintiff. On the trial the plaintiff proved that the defendant had caused the ground in a street called *Willoughby-street* to be dug up and removed; which digging was *opposite* to two lots owned by the plaintiff bounding upon the street, and upon one of which was erected a school house occupied by him. He also proved that Willoughby-street was dedicated to the public as a street, by the defendant and others, in 1829, and that he, (the plaintiff,) in 1831, purchased and had conveyed to him a lot bounded on that street, and in 1833 became the purchaser of another lot bounded on the same street, which was also conveyed to him. The plaintiff gave no evidence that Willoughby-street had been occupied and recognized as a street by the common council of Brooklyn, though the proof was ample that it was used as a street by the public.

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The defendant moved for a *non-suit*, and that the *cause be dismissed* for the want of jurisdiction in the court to proceed, on the following grounds: 1. That the plaintiff had failed to show possession in himself of the *locus in quo*; 2. That by the plaintiff's own showing it appeared that *title to land was in question*; 3. That the *locus in quo* was a public street, and that the plaintiff had not proved any damages. The court denied both applications. The defendant then adduced testimony on his part, and the jury before whom the cause was tried rendered a verdict in favor of the plaintiff, on which the municipal court rendered judgment, which was *affirmed* by the common pleas on *certiorari*. The defendant sued out a writ of error.

N. F. Waring, for plaintiff in error.

W. Rockwell, & W. A. Green, for defendant in error.

*By the Court*, COWEN, J. It was certainly a grave question, whether the plaintiff had any title in the soil of this street, *usque filum viæ*, under deeds bounding him upon it. He did not show that it had been accepted as a public street, but merely that the original proprietors had laid it out as such on a map, and that he had taken his deeds bounding him on the street. As between him and the defendant, perhaps it gave him a right of way. *Livingston v. The Mayor, &c. of New-York*, 8 *Wendell*, 85, 99. But that did not of necessity take from the defendant his right of soil. The plaintiff might still have been entitled to an easement only, 8 *Wendell*, 99, 105, 106, 107, 108. *Gidney v. Earl*, 12 *id.* 98.

But I do not go into this question farther than to see whether it was not necessarily involved in the plaintiff's own deduction of his claim before the municipal court; and if so, it is impossible to sustain the jurisdiction of that court by the provisions of the fifty dollar act, which it is admitted are to govern. 2 *R. S.* 2d *ed.* 168, § 59, 60, 61, 62, 63. See also *Statutes, sess. of 1827*, p. 145, § 47, 48, and p. 148, § 61; and *sess. of 1834*, p. 114, § 66, and p. 116, § 72. Under the sections of the Revised

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Statutes above quoted, there are two ways of arresting the proceedings in a justice's court. In the first place, where the defendant is conscious that the plaintiff can maintain his suit by evidence of actual possession, which is sufficient in itself as against all the world except him who has a paramount title, if the defendant mean to show an adverse title he must plead or give notice that he will do so, and tender the proper security that he will appear and abide a trial in the common pleas. This is the case provided for by the 59th to the 62d sections inclusive. But there are cases in which the plaintiff cannot maintain an action at all without showing a *title*; these arise where he has no actual possession at the time when the trespass is committed. In such case he must make out a constructive possession by showing an *actual title*. He must do so where the land is entirely wild, vacant or common; indeed in all cases where a *pedis possessio* cannot be shown. That is emphatically so where land is travelled and used as a public highway. It is open and common to all the world, apparently as much so as to the plaintiff himself. To make out a constructive title, he may prove himself in the actual possession of land adjoining the highway. The law then presumes that he is the owner of the soil *usque filum viae*. *Cook v. Green*, 11 Price, 736, 739. *Gidney v. Earl*, 12 Wendell, 98. In *Cook v. Green*, Richards, Chief Baron, lays down the rule in these words: that "the owners of land adjoining a road were entitled to claim property to half the soil of the road, unless a contrary right were proved." Such is undoubtedly the true rule. Now admitting that in the case before us the court had jurisdiction of a trespass committed upon the plaintiff's actual possession adjoining the street, still his title to the soil of the street itself remains in question. It is upon title alone that he can recover for a trespass committed there, which title is to be inferred from his actual possession. It is the same in respect to the right of an owner on the bank of a river above tide water. Both present questions of title and not of mere possession. Beside, what the plaintiff says is a highway or a river above tide, may not be so. If it be not so, then the rule of ownership does not apply. If what

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appears to be a common highway, be not in fact laid out as such, or the public have refused to accept it as a donation, it is not a common road, and ~~then~~ the adjoining owner cannot claim it ; for it is still the private property of the original proprietor, subject perhaps, to a mere right of private way in the adjoining owner, provided he has taken a deed which bounds him upon it as a street. Then the plaintiff here, who claimed as owner adjoining, was bound to make out a public highway. It is said in *Gidney v. Earl*, that a right of way, public or private, is but an incorporeal hereditament. *Nelson, J. 12 Wendell, 98.* Holman, J. says, in *Conner v. New-Albany*, 1 *Blackf. 45*, "a way, whether public or private, whether styled a road or a street, leading through town or country, is an incorporeal hereditament." Now whether a public way be a hereditament in every sense or not, it is certainly a *quasi* hereditament. It is an incumbrance on land, which very seriously affects the title to the soil. It is in itself real estate, a right to occupy land subject to a control in the owner very much reduced, and indeed destroyed for all the purposes of cultivation. In the case at bar, the plaintiff was perfectly conscious that he could not succeed, by showing the short time during which Willoughby-street had been occupied as a highway. Twenty years had not passed. He therefore, as he was bound to do, proved certain explicit acts of dedication, a city map laying down the street, an agreement among the proprietors that it should be a public street, and his own title deeds bounding him upon it as such. Then he insists that he has established a highway ; in other words, he ~~has~~ shown a title in the public to a *quasi* incorporeal hereditament, and from that seeks to infer his own title to the soil. If there be such a thing as "its appearing on the trial from the plaintiff's own shewing, that the title to lands is in question," § 63, this is that case. A most learned and complicated question of title was in fact raised and decided by the municipal court ; whereas the 62d section, already cited, declares that in such case, "the justice shall dismiss the cause, and the plaintiff shall pay the costs." He should have done that in this case, on the defendant's motion.

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I am aware that, without the 63d section, the statute would require the defendant, before he can oust the court of jurisdiction, to plead or give notice of his title. Section 59 is, that "In every action where the title to land shall in any wise come in question, the defendant at the time when he is required to join issue *and not after*, may plead specially any plea shewing that the title to land will come in question," &c. If not, says section 62, "the justice shall have jurisdiction, &c. and the defendant shall be precluded in his defence, from all evidence drawing in question the title to lands." Then follows the 63d section, which clearly must be read as an exception to section 59; otherwise, the whole of section 63 would be nugatory. We have noticed several cases to which it was intended that it should apply. There are various others, such as trover for timber by a reversioner, or any owner out of actual possession, and the like.

The court of common pleas erred in not reversing the judgment for the want of jurisdiction; and both the judgment of that court and the municipal court must therefore be reversed.

Judgment reversed.

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ZIMMERMANN vs. RAPP.

Proceedings in partition under the "Act for the partition of lands," passed 16th March 1785, are not obligatory upon a party in interest, who at the time was a *feme covert*, and was not *made a party* to the proceedings, although they were had upon the application of her *husband*.

THIS was an action of *ejectment* tried at the Montgomery circuit, in May, 1836, before the Hon. ESEK COWEN, then one of the circuit judges. The plaintiff, Magdalena Zimmermann, claimed to recover one fifth of the premises in question, as one of the children and heirs at law of *Nicholas Failing*, who died intestate the owner of the same, as long since as 1789, leaving five children his heirs at law. The plaintiff, at the time of her father's death, was a *married woman*, the wife of *Jacob Zimmermann*, who died in the winter of 1835. The defendant claimed title under

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*proceedings of partition* had in the court of common pleas of Montgomery county, by virtue of the act of the legislature of this state entitled "An act for the partition of lands," passed 16th March, 1785. The proceedings were commenced on the application of *Jacob Zimmermann*, the husband of the plaintiff, and of *Lawrence Gros*, the husband of another daughter of *Nicholas Failing*, and on the 14th June, 1792, commissioners to make partition of all the real estate of the intestate were appointed. The commissioners subsequently reported that the partition could not be made without prejudice to the owners; whereupon the common pleas on 16th February, 1793, made an order for the sale of the premises, which were accordingly sold, at public vendue, to *Lawrence Gros* for £1,300, to whom the commissioners, in pursuance of the sale, executed a deed conveying the premises on 1st May, 1793. The defendant derived her title under this sale. The evidence of the proceedings in partition was very imperfect, but a radical defect pervading the whole was, that *it did not appear* that the plaintiff, in this cause, *had been made a party* thereto. The jury, under the direction of the judge, found a verdict for the plaintiff. The defendant asked for a new trial.

*S. Stevens*, for the defendant.

*D. Cady*, for the plaintiff.

*By the Court*, NELSON C. J. The only question in the case material to notice is, whether the plaintiff is bound by the proceedings in partition, her *husband* alone being a party thereto. He was tenant by the curtesy initiate, and at most had but an interest for life in the premises, and upon general principles could do nothing to the prejudice of the estate of the reversioner. The partition may have been valid to the extent of his interest, or during his lifetime, but beyond that period the proceedings are clearly nugatory, unless there is something in the statute specially affecting the interest of the wife.

The proceedings were instituted under the 15th section of the

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act of 1785, which provides that application for partition may be made by one or more of the *owners or proprietors* of the premises, and in case of sale, on the ground that partition would be prejudicial, conveyances are to be made to the purchasers, "*which shall operate as an effectual bar both in law and equity against such owners, or proprietors,*" &c. By the terms *owners or proprietors*, I am inclined to think the legislature intended to designate the persons holding the *fee*; but whether so or not, cannot be material in this case, for it is clear, the effect of the conveyance here declared, does not extend beyond the interest of the applicant, whatever that may be. If the words include a tenant for life, his estate only is bound, not that of the remainderman or reversioner. In 1788, an act passed expressly authorizing partition between owners in common holding for life or years, and between them and persons having an estate of inheritance; but it provided that such partition should not be prejudicial to any person or persons other than the parties, their executors and assigns. This statute was taken from the 32 H. 8 c. 32, under which it has been held that a tenant by the curtesy within the equity of it, might have a writ of partition, though neither joint tenant, nor tenant in common, as he is in equal mischief with any other tenant for life: but such partition is temporary only, as well from the saving clause, as upon general principles. To make the partition absolute, there must be another writ against the remainderman or reversioner, as soon as his estate falls into possession. *Allinant on Part.* 59, 63, 64. *Co. Litt.* 175. *Litt. R.* 300. 2 *Cruise*, 534, § 38. 1 *Co. Litt.* 699. 1 *Ves. & Beame*, 555. The authorities are also full, that the wife must be made a party to the proceedings in order to bind her interest. 1 *Co. Litt.* 819. *Allinant*, 64. *Co. Litt.* 71, a. 1 *Atk.* 541.

New trial denied.

## Simpson v. Rhinelanders.

## SIMPSON vs. RHINELANDERS.

On a return to a *certiorari* to remove proceedings had by a *landlord* against his *tenant*, under the act authorizing *summary proceedings*, to obtain the possession of land for non-payment of rent, &c., this court will not look into the evidence to determine whether the verdict is supported by it; the rule will be adhered to as laid down in *Birdsall v. Phillips*, 17 *Wendell*, 464.

The rule prevailing in England that on *summary convictions upon penal statutes*, the evidence must be stated, was not intended to be questioned in *Birdsall v. Phillips*: but the court hold that it does not apply to *orders or other adjudications*.

In a proceeding by a *landlord* against his *tenant*, the affidavit required by the statute, may be made by an *agent*, and if by it probable want of permission to hold over is shown, it is enough.

The affidavit in these cases should show a *right of re-entry* for non-payment of rent; where, however, it appeared that a lease containing a clause of re-entry was returned to the court as evidence exhibited on the trial, the court presumed that it was exhibited to the magistrate on his issuing the summons.

The affidavit cannot be regarded as evidence on the merits; it is as a *plaint* in a cause and stands for a declaration.

LANDLORD and tenant. Proceedings were instituted by the Messrs. Rhinelanders against Simpson, under the act authorizing *summary proceedings* to recover the possession of land in certain cases, 2 *R. S.* 512, *et seq.* before an assistant justice of the city of New-York, the complainants alleging that Simpson was their tenant of certain premises, and that he held over without their permission, after having made default in the payment of rent. The *affidavit* upon which the proceedings were instituted, was made by one E. G. Smith, who stated himself to be the *agent* of the landlords, and that Simpson was justly indebted to them in the sum of \$1,653.50, due the first day of February, 1832, for rent of all that certain lot, &c., (describing the premises) as formerly possessed, &c., and as subsequently leased by the landlords to Simpson. He further stated that Simpson held over and continued in possession of the premises without permission of the landlords, after a default in the payment of the rent pursuant to the agreement under which the premises were let; that satisfaction of the rent could not be obtained by distress



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of any goods, and that he had made demand of the rent from Simpson personally. Upon receiving this affidavit the justice issued a summons to show cause, &c., upon which the tenant appeared and joined issue. The cause was tried by a jury, who found a verdict in favor of the landlords, and the justice issued a warrant to put the landlords into possession. The tenant sued out a *certiorari*, and upon the coming in of the return, the cause was submitted on written arguments by :

*H. M. Western*, for the tenant.

*W. L. Morris*, for the landlords.

*By the Court*, COWEN, J. The return states not only the affidavits, process, &c., but all the evidence on both sides, with the charge to the jury and even the summing up of counsel. We are accordingly appealed to, as is usual upon such returns to re-try the issue which has been passed upon by the jury under the direction of the justice. Certain results are insisted upon as established by the evidence, which is detailed in the order of the witnesses, as it would have been on a case for a new trial, because the verdict was against the weight of evidence. In analogy to the proceedings by *certiorari*, under the fifty dollar act, an affidavit was made stating the evidence, and on this the *certiorari* was allowed. It was served upon the justice who has returned specially to all its details, and annexed a copy of it to his return. Copies of the indenture of lease, with assignments, and accounts current are added *in hæc verba*.

Those parts which properly enter into the frame of the record in the court below, are, with the exception of the affidavit, admitted to be sufficient and regular. They alone are the proper subjects of a return, and therefore are all which we can legally notice, according to the case of *Birdsall, v. Phillips*, 17 Wendell, 464. I admit that this court is, in some measure, responsible for the extent of territory, which the present and like common law *certioraris* have for some time occupied, by the facility with which, in some few cases, where the objection was either not

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raised or slightly passed over, it yielded to the assumption of an analogy between them and the statute certiorari directed to justice's courts. A distinction was, however, established in *Birdsall v. Phillips*, after a good deal of consideration ; and must be adhered to. The practice as understood by the parties here, had become so inveterate, that we have several times been called upon to reconsider that case ; and have done so. The result is a perfect confidence that we were right both upon the English books and our own.

There is certainly one class of English authority, which we did not much consider in that case, and which without being also distinguished from it, may mislead. I allude to the cases which hold that in all summary convictions upon penal statutes, you must state the evidence. These cases are fully collated by the English treatises on penal convictions, and need not be particularly referred to. *Boscawen*, 68 to 108, *tit. Evidence*. *Nares*, 19 to 28. The result as given by Mr. Nares is, "It must appear the party is legally convicted ; therefore the evidence must be regularly set out at large, in order that the court may judge whether the justice has convicted upon proper evidence, and this both the evidence against and for the defendant ; and the best way of stating it, is to state it in the language of the witness, and particularly the fact as proved, as Lord Hardwicke in *Rex v. Lloyd*, 2 *Str.* 999, says it is fully settled in convictions that the evidence must be set out." *Nares*, 19. Mr. Nares adds, however, even in this case, that the magistrate is the sole judge of the weight of the evidence ; and the court of king's bench will not examine whether he has drawn the right conclusion ; but if no evidence appear in the conviction to support a material part of the information, the court must quash the information. *Nares*, 28. These positions we do not mean to question, and did not in *Birdsall v. Phillips*. But as to orders and other adjudications, the case is altogether different ; and in the very decision relied on by Nares, *Rex v. Lloyd*, Lord Hardwicke himself acted upon the distinction. There a statute had

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empowered the quarter sessions, on complaint and summary proceedings for misbehavior, to remove clerks of the peace of counties. This office was, as Denison of counsel said, a freehold in the county of *Cardigan*, where Lloyd was removed by a conviction stating, in a very general way, that the removal was on hearing due proofs, &c. See the form, 2 *Str.* 996. On certiorari, it was likened to a penal conviction and a demurrer to evidence; and counsel insisted that the evidence should have been set out; that it was penal, as the party was removed from a freehold for misbehavior. Lord Hardwicke answered: "It is fully settled in convictions, that the evidence must be set out; and if this was to be considered as a conviction, it would therefore be bad. But we are all of opinion it is to be considered as an order. And though it is said here is a punishment that follows, viz. the loss of the office, yet the same may be said of most of the acts of justices, where very severe penalties often follow. The case of orders of bastardy is very strong; and as to the cases of setting out evidence on demurrers, it is absolutely necessary to have it on record, and the superior court are judges of the fact as well as of the law, which on certiorari we are not." So on a certiorari to the mayor of Philadelphia, to remove a judgment for the plaintiff in debt on a by-law imposing a penalty, the first exception was that the evidence was not set out, which is necessary in every conviction. *Sed per curiam*. This is no conviction. It is a *qui tam* action of debt by the plaintiff under a by-law. Convictions are always on the prosecution of the state. *Carlisle v. Baker*, 1 *Yeates*, 471. And see the case of *Spring Garden Street*, 4 *Rawle*, 192. Indeed it is well known that there is such great nicety in drawing up penal convictions under the strictness of the common law, that the legislature have in several cases, by express enactment, prescribed forms omitting the common law requisites.

The only part of the return, therefore, that we are properly called on to examine, is the affidavit; and this is objected to as having been made by the agent, without rendering any excuse why it was not made by the principals or either of them. The

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answer is, that the statute requires none. It is absolute, that the affidavit may be made by the agent or principal at their option. 2 R. S. 422, 2d ed., § 29. The rule sometimes applied to affidavits in the course of practice, does not apply ; nor does the rule in respect to primary or secondary evidence as counsel suppose. Indeed, if there were such a distinction, the agent's affidavit should be esteemed the primary evidence, as coming from the more disinterested source. But this affidavit is not evidence upon the merits. It is made as a plaint in the cause and stands for a declaration, on which the tenant is put to join issue by his affidavit. It is said the agent cannot positively negative the permission to hold over mentioned in the 2nd subdivision of the 28th section. That, however is in fact done by the affidavit ; and the agent may, where he is in the exclusive management of the property, be enabled to speak with great confidence. It is enough however, that the affidavit show a probable want of permission. If it exist, the proof of the fact is properly matter of defence, to be set up by the tenant's affidavit, as he attempted to do in this case ; and by proof to the jury.

It is more doubtful whether the affidavit disclosed, with sufficient particularity, an agreement by which the lessors were entitled to *re-enter* for non-payment of rent on the failure of an adequate distress. No point upon that is made now, however ; and none was made, that I see, in the court below. The indenture of demise containing a clause of re-entry for simple non-payment, is annexed to the return ; and, under the circumstances, perhaps, we ought to intend that it was presented to the justice in connection with the affidavit as part of the proof upon which he issued his summons.

Proceedings affirmed.

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The People *s.* Monroe Oyer and Terminer.

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THE PEOPLE, *ex rel.* Octavius Barron, *vs.* THE MONROE OYER  
AND TERMINER.

After a conviction, an indictment will not be quashed on the ground that during the pendency of the trial, a *second indictment* for the *same offence* was found by the grand jury.

The mere finding of a *second indictment* is not *per se* a supersedeas to the first indictment; a motion to quash must be made, and made too before the trial on the first indictment has commenced; at all events, before the cause is submitted to the jury. Ordinarily a motion to quash must be made previous to plea pleaded, or any evidence given in the case.

A *mandamus* will not be granted to a court acting under a special commission which has expired by its own limitation previous to the motion for the suit.

Two indictments for same offence. The relator was convicted upon a charge of murder at a special oyer and terminer, held in the county of Monroe on the fourth Monday of May last. Pending the trial, a second indictment was found by the grand jury for the same offence. After the conviction upon the first, and when the presiding judge was about to pronounce sentence upon the prisoner, a motion was made by his counsel to quash the indictment upon a provision of the statute, 2 R. S. 726 § 42, which is as follows: "If there be at any time pending against the same defendant two indictments for the same offence; or two indictments for the same matter, though charged as different offences, the first found *shall be deemed* to be superseded by the second indictment, and *shall be quashed.*" The court denied the motion and an application is now made for a writ of *mandamus*, directing the oyer and terminer to quash the indictment.

The following opinions were delivered :

By Chief Justice NELSON. The court of oyer and terminer at which the relator was tried was held under a special commission, which has expired; and as the writ is intended to act, and must, to be effectual, act upon the inferior tribunal, we cannot but see that it would be an unavailable remedy; the court could not possibly enforce it. This view of itself would be a sufficient answer

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to the motion now made. We have no difficulty, however, upon the merits of the application. The statutes declaring in terms that the first indictment shall be deemed to be superseded by the second, intended simply to prescribe the rule of the case ; not that it should become waste paper and nugatory, without the action of the court ; the subsequent clause directing that it shall be *quashed*, as well as the fitness and propriety of the proceeding in the particular case, affords a sufficient indication that this must have been the intent of the legislature. The time when a court will entertain a motion to quash an indictment, rests in some degree in the exercise of a sound discretion ; but it appears to be conceded in the books that it must be made before the case is submitted to the jury ; ordinarily it must be made before plea pleaded, or any evidence given in the case. This view of the usual practice of the court in these cases would also afford a sufficient answer to the application for the writ, as no motion to quash was made to the court below until after the trial and conviction ; and we feel less difficulty in yielding to a strict observance of this practice, inasmuch as the motion is predicated upon grounds altogether technical, and in no particular connected with the proceedings or trial upon the merits ; it is not pretended but the prisoner has had a full and fair trial, and that the conviction is in accordance with law.

But we are disposed to put the denial of the application upon still broader ground, and to construe the statute as referring to the case of indictments before the trial upon either has commenced, and as intending simply to indicate the rule which shall guide the public prosecutor and the courts in respect to the indictment upon which a trial may be had ; and also to enable the prisoner to know upon which he will be tried. Another object, doubtless, was, to protect him against the injustice of being held to bail upon two separate indictments charging the same offence.

It surely could not have been the intention to give to the action of the grand jury, in finding the second indictment, an effect that would break up a pending trial upon the first ; or, as contended in this case, that would even avoid a regular conviction. Such

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a view of the section would involve a folly and absurdity that should not be imputed to the makers of the law, when effect may be given to it consistent with sound principles.

We therefore deny the motion.

Mr. Justice BRONSON concurred in the above opinion.

By COWEN, J. The statute is very strong. But it clearly contemplates the action of the court. The finding of the second indictment does not *ipso facto* annul the first; there must be a motion to quash. That motion certainly cannot be made after the trial and a verdict found. Nor should the court grant any relief on motion where the prisoner has been guilty of laches. On motion after trial, he should at least clear himself of laches by affidavit, which was not done in this case. Besides, after verdict, it was a matter of discretion whether the court would listen to the application; with the exercise of which we can not interfere by mandamus. Nor can we enforce a mandamus directed to a special court of oyer and terminer limited to a short time in its existence. The statute is a very singular one. Why it should have been passed in regard to a matter which stood on a much better footing at the common law, it is difficult to conceive. In general the objection that a second indictment has been found is merely technical; and in case of any real inconvenience to the prisoner, it was always the duty of the court to interfere. It may be too much to say that under the broad language of this act, unqualified and restricted by no words except the pendency of the two indictments, the motion must be made before the trial on the first begins. Both indictments may be said to be pending until one is determined by a verdict. But it is unnecessary to distinguish here whether the motion must precede or may be made during the trial. All I mean to say is, that independent of that question, I cannot consent to a mandamus under the circumstances of this case.

Pearsall v. Post.

PEARSALL vs. POST. ✕

SAME vs. HEWLETT.

The public has not the right to use and occupy the soil of an individual adjoining navigable waters, as a public landing and place of deposit of property in its transit, against the will of the owner, although such user has been continued for more than twenty years. The user cannot be urged by the public, either as the foundation of a legal presumption of a grant, and thus justify a claim by prescription, or as evidence of dedication of the premises to public use.

The capacity of the public at large, as distinguished from corporations or quasi corporations, to acquire a right to use and occupy the soil of an individual in any manner or mode of appropriation, other than to pass and travel over it, and the setting up of such right as prescriptive upon the presumption of a grant, or that the owner has dedicated the premises to public use—considered, and a variety of cases cited and commented upon.

So, also, the rights of riparian owners considered in respect to ferries, where passengers and merchandize are landed on the shores of rivers; and the distinction existing between passing over the soil where a road has been laid out, and using it as a landing.

So, also, the validity of grants considered, where there are no persons in esse capable at the time of taking as grantees, whether such grants be for religious or charitable purposes, or to promote the cause of education.

The commissioners of highways of the counties of Suffolk, Kings and Queens (the Long Island counties) have power to regulate public landings and watering places already existing, but not to lay out and establish new public landings and watering places. Nor can encroachments upon such landings be summarily inquired into by a jury, as may be done in cases of encroachments upon highways; their power is limited to highways.

THE first of these cases was an action of trespass *quare clausum fregit*, for entering upon the land of the plaintiff, tearing down fences and depositing upon his land a quantity of manure. The second was an action of *assault and battery*, attempted to be justified upon the same grounds that the entry upon the lands were sought to be justified. Both causes were tried before the HON. CHARLES H. RUGGLES, one of the circuit judges.

The plaintiff is the owner of a farm in the town of North Hempstead, in the county of Queens, on Long Island, adjoining Hempstead harbor, which has belonged to his ancestors for

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upwards of a century. On this farm there is a *landing* called *Pearsall's landing*, which, on the trial of the first above cause, it was proved had been used by the public ever since 1764, for the purpose of loading and unloading vessels, and for the deposit of wood and other property carried to and from the landing. About the year 1800, the farmers in the vicinity of the landing began the practice, which has continued ever since, of bringing manure from the city of New-York and depositing it upon the landing, so that not unfrequently an area of one and a half acres would be covered. Shortly previous to February, 1835, the plaintiff enclosed with a fence that portion of his farm called the landing, it never before having been enclosed, and on the arrival of the first vessel in that year with manure, the acts took place for which the first above suit was brought. The suit against *Hewlett* was brought under the following circumstances : On the 17th March, 1835, *Hewlett*, being a *commissioner of highways*, went on the *locus in quo* with a number of men, cattle and implements, and commenced ploughing and scraping down a knoll. The plaintiff forbade him, and ordered him to depart, and on his refusing to do so, took hold of him for the purpose of removing him, when the assault and battery complained of took place. The defendant offered to prove that at the time when the plaintiff forbade his proceedings, he was acting in pursuance of a determination previously made by the commissioners of highways, to regulate, repair and alter the landing place in question ; but the evidence being objected to, was rejected by the judge. The defendant also offered to prove that on the 25th March, 1835, proceedings were instituted against the plaintiff under the act regulating highways and bridges in the county of Suffolk, Queens and Kings, for an *encroachment* upon the landing by the erection of the fence, (in which proceedings, the *locus in quo* is designated as a "certain highway or public landing,") and that a jury were summoned, who after hearing the evidence, *certified* that the place in question *had been encroached upon* by the plaintiff ; but this evidence also being objected to, was rejected by the judge. In relation

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to the *user* of the landing by the public, the same evidence in substance was given in this case as in the former. The judge charged the jury in the *first case*, that the *public* might acquire a right or easement in the lands of an individual by *dedication* to the public use, and that such dedication might be by writing or without writing; that in this case there was no direct evidence of the act of dedication by the owner of the fee, but that the defendant relied upon long continued user. He instructed the jury that such user between individuals, would be *evidence of a grant*; and that as between the *owner* of the fee and the *public*, an actual and uninterrupted user for twenty years, accompanied by a claim of right brought home to the knowledge of the owner, was *evidence of dedication*. During a portion of the twenty years, the property was held by individuals under *particular estates*; the time of the continuance of which estates the judge directed the jury to exclude from their consideration, as it regarded the question of acquiescence. *The jury found a verdict for the defendant*. In the *second cause*, the only question submitted was that of *damages*, and the jury found for the plaintiff, with six cents damages and six cents costs. The plaintiff in the first, and the defendant in the second cause, applied for new trials. Both causes were heard in one argument.

*H. P. Edwards*, for the plaintiff, 1. That the verdict in the first cause was against evidence; 2. That the right of the *public* to use the *locus in quo* as a *landing place* and *place of deposit*, if such a right can be acquired by user, can only be acquired by an *adverse user* under a claim of right, known to the owner of the fee for the period of twenty years; in support of this proposition, he cited 1 *Greenleaf*, 111; 3 *id.* 122; 1 *Yeates*, 167; 9 *Serg. & Rawle*, 31; 9 *Pickering*, 256; 13 *id.* 240; 2 *id.* 46; 14 *Mass. R.* 52; 9 *Johns. R.* 167; 7 *Wheaton*, 59, 109, 110; 3 *Starkie's Ev.* 1201, *tit. Prescription*; *id.* 1217, 18; 3 *Kent's Comm.* 444; 2 *Brod. & Bing.* 667; 1 *Price*, 247; *Adams on Ejectment*, 48, n.; 1 *Johns. R.* 158; 12 *id.* 368; 9 *id.* 167 and 180; 8 *id.* 227; 13 *id.* 118; 18 *id.* 44; 2 *Caines*, 185. *Thirdly*: the counsel contended, that if even an *adverse user* had been

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shown, it had not been shown to have continued for a sufficient time to ripen into a right, in consequence of the intervention of particular estates, during the existence of which no presumption could be made against the owner of the fee. *Fourthly*: he insisted that the defence could not be sustained on the principle of a *dedication*, because, he insisted, that a dedication could not be made by words, nor by mere acquiescence in a user; it must be by acts from which the intent of the owner to dedicate the premises to the public use is necessarily inferrible. 3 *Kent's Comm.* 451, and notes. 6 *Cowen*, 751. *Adams on Eject.* 249, n. 3; 7 *Johns. R.* 186. *Fifthly*: he insisted that the right set up by the defendant is not an *easement*, nor an *incorporeal right* of any kind; that it is corporeal, and can be exercised only by taking actual possession of and occupying the premises to the exclusion of the owner, i. e. by ousting him from the possession, and thus committing an act for which ejectment will lie. From all which he argued that the defence could not be sustained. In support of this point, he cited 2 *Black. Comm.* 20; 2 *Starkie's Ev.* 293; 1 *Chitty's Pl.* 220; *Salk.* 246; 7 *East*, 312 12 *id.* 141; 9 *Serg. & Rawle*, 31; 1 *Greenleaf*, 111.

*S. A. Foot*, for the defendant, insisted, 1. That the verdict in the cause of *Pearsall v. Post* is fully supported by the evidence; 2. That there was a clear and unequivocal *dedication* of the landing to public use, and that the public had used it without interruption until the erection of the fence by the plaintiff in 1835; 3. That the *dedication* was made long before the commencement of the life estates proved to have existed in this case; that such life estates, admitting them to have continued until 1827, could not deprive the public of the benefit of the user of the landing during the continuance of the same, because: *first*, the dedication was perfect before the life estates commenced; *second*, if not perfect, the previous user had given the public an inchoate right, which ripened and became absolute by the continued user during the life estates, and for a period of eight years after their termination, viz. from 1827 to 1835; and *third*, the user was known to the remainderman during the continuance of the life estates, and was

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acquiesced in by him. The counsel cited and commented upon the following cases : 6 *Wendell*, 651 ; 12 *id.* 172 ; *Woolrych on Ways*, ch. 2, pp. 10, 13, 14 ; *Campb.* 260 ; 5 *Barn. & Ald.* 458 ; 4 *Barn. & Cress.* 574 ; 11 *East*, 372 ; 5 *Taunt.* 34 ; 4 *Campb.* 15.

*By the Court, COWEN, J.* Assuming that the law will notice and enforce the right set up, and the sort of testimony introduced by the defendant, we perceive no foundation for granting a new trial, on the ground that the verdict was against the weight of evidence. There was enough to warrant the jury in finding for the defendant. Nor can any fault be found with the judge's charge, which put the defence to them with every qualification under which the most cautious judges have allowed the class of presumptive easements. He distinctly admonished them that before the defendant would be entitled to their verdict, they must be satisfied that there was a continuous adverse user, with the owner's knowledge, of at least twenty years, during the absolute ownership of the plaintiff, and those under whom he claimed, without estimating the particular estates of the life tenants ; and that they must also find the acts imputed as a trespass to have been done within the boundaries as indicated by the ancient user. The verdict must, therefore, be taken as finding all these facts in favor of the defendant ; and the case comes down to the two questions : 1. Is a public right of landing and deposit for all the citizens of the state known to the law ? and 2. Will the law infer such a right from ancient and adverse user by all citizens indiscriminately ?

The claim is not one of a temporary license, revocable at the will of the owner, but of a permanent legal estate, which is resembled to an individual right in fee ; an incorporeal hereditament, exerciseable in the soil of another, vested, exclusive and absolute ; and if to be allowed, depriving the plaintiff, in effect, of all future control over the premises except as a common occupant with his fellow citizens. The claim is novel in its character, justified by no direct precedent with us or in England ; at least we are referred to none, and is to be drawn, if at all, mainly from

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principle and analogy. Both are sought for chiefly in the doctrine of dedication of ways, which truly has in this country been considerably extended by adjudication, and still more by *dicta*.

. It was not denied, either on the trial or in argument at the bar, that a street, highway, or right of public passage, may be derived from a *dedication*, to be shown by the express assent of the owner of land, or inferred from an adverse user of twenty years. The English books are full to this point. *Lade v. Shepherd*, 2 *Str.* 1004. *Rex v. Lloyd*, 1 *Campb.* 260. *Roberts v. Karr*, 1 *id.* 262, note (b.) *Rugby Charity v. Mereweather*, 11 *East*, 375, note. *Jervis v. Dean*, 3 *Bing.* 447. *Rex v. Barr*, 4 *Campb.* 16. This principle has been adopted by several courts of the United States. *Denning v. Roome*, 6 *Wendell*, 651, 656 to 658. *Wyman v. Mayor, &c., of New-York*, 11 *id.* 486, and vide 8 *id.* 105. *Pritchard v. Atkinson*, 3 *N. Hamp. R.* 335. 4 *id.* 10, *S. C. and S. P. Commonwealth v. McDonald*, 16 *Serg. & Rawle*, 390. *Estes v. The Inhabitants of Troy*, 5 *Greenl.* 368. *Hollerman v. The Commonwealth*, 2 *Virg. Cas.* 135. *Rowell v. The Inhabitants of Montville*, 4 *Greenl.* 270. *The State v. Campton*, 2 *N. Hamp. R.* 513. *State v. Wilkinson*, 2 *Verm. R.* 480. *The State v. Gregg*, 2 *Hill's R.* 387. Such also is the law of Scotland. *Harvey v. Rogers*, 3 *Bligh, N. S.* 440, *on appeal to the house of lords*. And of Ireland. *Fitzpatrick v. Robinson*, 1 *Huds. & Br.* 585. The decisions on the point in *Massachusetts* are not very explicit; but evidently tend to the same result. *Hinckley v. Hastings*, 2 *Pick.* 162. *Commonwealth v. Low*, 3 *id.* 408. *Reed v. Inhabitants of Northfield*, 13 *id.* 94. In *Louisiana*, the code denies all claim by prescription to rights of servitude which in their nature are discontinuous or interrupted, *Lou. Code*, art. 723; and such are ways. *Broussard v. Etie*, 11 *Lou. R. by Curry*, 394. Our own code, on the contrary, has long expressly recognized the prescriptive right in a public highway. Formerly the user must have been 20 years previous to and next preceding the 21st of March, 1797, 1 *R. L. of 1801*, p. 595; 2 *id. of 1813*, 277, § 24, and this court seems to have considered itself bound to allow no claim founded

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on user for any other term. *Galatian v. Gardner*, 7 Johns. R. 106. *The People v. Lawson*, 17 id. 277. But 20 years general occupation was allowed by the act of February 21st, 1817. *Laws of 1817*, p. 32, § 3. 1 R. S. 517, 2d ed. p. 521, § 104. And to this, as will be seen by the cases cited from *Wendell*, we have superadded the English law of *Dedication*, which, under circumstances, will certainly raise a right even short of 20 years. The present chancellor has extended and applied the doctrine to a *village square*, laid out by the original proprietor. *Watertown v. Cowen*, 4 Paige, 510. He did this on the authority of *Cincinnati v. White's lessee*, 6 Pet. U. S. Rep. 431. The latter case raised an urban right of common, or open ground laid out by the original city proprietor. *Vide Howard v. Rogers*, 4 Mar. & John. 278, *contra*. It was, I find, preceded by a similar decision, after much consideration in the supreme court of Vermont, with respect to the *public square* of St. Albans. *State v. Wilkinson*, 2 Vt. R. 480. But the indictment there went on the ground of the square being a *public highway*, and called it so in both counts. The way was obstructed by a building, which was held to be a public nuisance. *Abbott v. Mills*, 3 Verm. R. 521, and *State v. Catlin*, id. 530, S. P., as to *Burlington Common and College Green*. *Vide also State v. Trask*, 6 id. 355. In *Cincinnati v. White's lessee*, it was not so necessary to characterize the right, as the action was an ejectment, adverse to the city, and founded on the title of the original proprietor. But the objection now raised in argument, and which presents the most serious difficulty in giving effect to a dedication, the *want of a grantee*, is thus treated by Mr. Justice Thompson in that case, who delivered the opinion of the court: "Dedications of land for public purposes have frequently come under the consideration of this court; and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title, applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which this court has considered such dedications for public use. The law applies to them rules

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adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication." The case is compared to that of *Pawlet v. Clark*, 9 *Cranch*, 292, 331, wherein it was said that a grant for the use of the Episcopal church, without any one of present capacity to take, placed the fee in a condition to await the legal creation of a grantee. The case of *Beatty v. Kurtz* 2 *Peters' C. C. R.* 566, is also adverted to as coming under the same notion. There a town lot was set out by the proprietor on his map, for the use of the German Dutch church, and the use was enforced in equity, though the church was a voluntary unincorporated society. In *Inglis v. The Sailor's Snug Harbor*, 3 *Peters' C. C. R.* 99, a devise for a charitable object was carried into effect in favor of a corporation afterwards created, the will clearly looking to such a creation. This case proceeded much on the doctrine of executory devises. The right of dedication to an unincorporated Congregational church was examined and recognized as available by Mellen, Ch. J. in *Shapleigh v. Pilsbury*, 1 *Greenl.* 271, 280. A similar right has been recognized in Massachusetts, *Rice v. Osgood*, 9 *Mass. R.* 38, 44, and finally by the present chancellor of our own state in favor of a Baptist society. *Hartford Baptist Church v. Witherell*, 3 *Paige*, 296. He shows that the supreme court of the United States once denied that the power could be exerted in favor of a voluntary religious society of that description, even with the aid of chancery, *Philadelphia Baptist Association v. Hart's Exe'rs*, 4 *Wheat.* 1; but had abandoned that ground in the latter cases. The same doctrine has been extended to the Catholic church. *McGirr v. Aaron*, 1 *Pennsylv. R.*, *Penrose & Watts*, 49; to purposes of charity and education in the Lutheran church, indeed for the purposes of general education, *Witman v. Lex* 17. *Serg. & Rawle*, 88, 91, and last, though by no means least, for the purposes of the American Bible Society, by the case of *Burr's Ex'rs v. Smith*, 7 *Verm. R.* 241. In this case we are furnished with a collection from almost all the books bearing on the question, from the ear-

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liest times ; the principal authorities are ably summed up and weighed by Chancellor Williams, who delivered the opinion of the court, though it must be admitted that their effect as inferred by him, is eloquently and powerfully combated by Chancellor Mattocks, who dissented from his conclusion.

In short, it seems to be well settled by the supreme court of the United States, by several courts in the neighboring states, to which we may, perhaps, add the court of chancery in this state, that dedications of land for religious and charitable purposes, as well as for public ways, and squares, commons, parks, and other easements in nature of ways, are to be upheld, although there be no person *in esse* capable of taking as a grantor at the time. It was remarked by Mr. Justice Thompson, in *Cincinnati v. White's lessee*, 6 Peters' U. S. R. 436, that "the principle, if well founded in law, must have a general application to all appropriations and dedications for public use, where there is no grantee *in esse* to take the fee." He adds, "This forms an exception to the rule applicable to private grants, and grows out of the necessity of the case." These remarks comprehend every conceivable case where a man has furnished evidence of a clear intent to give up his real estate for the purposes of *any legitimate public use*; and pursuing the parallel between highways and other public objects, the latter will stand in every variety capable of establishment by the usual proof of 20 years adverse enjoyment. A public right of landing and deposit on the shores of the ocean, or of bays and rivers, is included ; and thus we reach the claim as introduced by the present defendant and found by the jury. Between the positive aid of the court of chancery, and the rule of law which sanctions the right of a prospective grantee, though acting merely to religious, charitable and educational ends, will be found to cover a very large field which has heretofore remained pretty much uncultivated. This was in some measure shown by Chancellor Mattocks, while considering the case of *Burr's Ex'rs v. Smith*; and with regard to public easements of a merely temporal character, establishments for the benefit of the trading and agricultural as well as the travelling community, one can hardly suppose



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less, if the principles indicated are to be carried out to their full extent. I pass over the more usual instances of easements, such as ways, commons, and water privileges, &c., enjoyed either by individuals, towns, or other corporations. In such cases there being a definite person capable of taking, there is no obstacle to presuming a grant from usage. The whole is matter of private right. We may also pass over those which are less common, and one put by Mr. Justice Thompson, in 6 *Peters*, 437, from *McCConnell v. Lexington*, 12 *Wheat.* 522, the reservation of a spring of water for public use. It was made to a corporation which might turn the spring to its own or public purposes. Thus, the user was invoked to establish an individual right. A like case is mentioned in *Co. Litt.* 56, a., a customary watering place in the Inhabitants of Southwarke, for violating which an action was held to lie. So where the acknowledged proprietors of a fishery and their lessees had, for above 20 years, publicly landed their nets on land belonging to another, and had, at various times, repaired and improved the landing place, it was held that the jury might presume a grant of the right so exercised. *Gray v. Bond*, 2 *Broth. & Bing.* 667. *Hart v. Chalker*, 5 *Conn. R.* 311, *S. P.* The latter case related to a sand beach contiguous to Long Island Sound, and both were cases of an actual occupation of the shore. But in both, parties appeared who were capable of granting and receiving a grant; and both are put on the ground of an actual grant presumable from the usage and other circumstances. They present us with another incorporeal hereditament, like a common, a servitude exercisable by one and his heirs, within the soil of another and his heirs. So in regard to the right of fishery itself in the waters of another. *Melvin v. Whiting*, 10 *Pick. R.* 295. Indeed the right inferrible from usage, both to the *servitude* of the civil, and the *easement* of the common law, rests almost without exception, on the idea of a grant between competent parties. 3 *Kent's Comm.* 3d ed. 434, 444. The only easement by dedication to the public, mentioned by the learned commentator, is the common highway or street. *Id.* 450, and see *Woolrych on Ways*, 10 to 14.

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It is said in one case, that a way, whether public or private, is equally an incorporeal hereditament ; and the same case speaks of a grant of a public highway. *Conner v. New Albany*, 1 *Blackf.* 43, 45, and see per *Nelson, J. in Gidney v. Earl*, 12 *Wendell*, 98. But I have searched in vain among the English books for the idea of a grant which can enure to the personal use of all mankind. The adjudged cases begin with *Lade v. Shepard*, in 8 *Geo.* 2, and come down to us under the head of dedication to the public ; nor do they present a single instance of any other easement under that head. Nor am I aware of any other easement which the sovereign can be said to hold for the free use of the subject. It is true that in *Bolt v. Stennett*, 8 *T. R.* 606, a quay for the landing of goods was likened to a way, and it was held, might be pleaded in trespass as *public and open* ; but it was *for a compensation to the owner* ; and the quays purchased by government are under their own regulation, at least for the purposes of the customs, and generally, if not universally, subject to a toll called *keyage or wharfage* ; *T. R.* 608, and note (b.) ; *Hargr. Tracts*, vol. 1, p. 77 ; *Tomb. Law Dict. Key and Keyage* ; whereas a public highway is most commonly free and without toll. Hammond, in his treatise on the law of *Nisi Prius*, p. 193, *Am. ed. of 1823*, speaking of public right by dedication, says: "The simple act of throwing open the property to the public use, without more, is sufficient to create this right, and no other formalities are essential ; the case, therefore, is *anomalous*, and general utility is the principle which sanctions this mode of conveyance." Again: "Whatever may be his (the owner's) real intention, if his conduct is at variance with his purpose, he cannot afterwards contest the right of the public, who perhaps have embarked in projects and formed expectations upon the strength of the appearances he held out to them, which it would be ruinous to disappoint." *Id.* 194. It will also be seen by several of the English and American cases cited, that the mere oral declarations and acts of the owner will warrant the presumption of a dedication, though they have been followed by public enjoyment but a very short time, and much less than 20 years. Thus, though it be of the nature of

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an incorporeal hereditament, and, indeed, of all real estate, since the statute of frauds, to pass by deed only, we find a most important easement forming a plain and well established *exception*. It stands entirely independent of all *grant* or *presumption of grant*. Indeed, the *Cincinnati way of common* in *6 Peters*, 438, was so treated by Mr. Justice Thompson. He says: "After being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an *estoppel in pais*, which precludes the original owner from revoking such dedication." It is well settled that the banks of rivers and of the sea are private property, and that the public have not, at common law, even the right of towing. *Ball v. Herbert*, 3 T. R. 253, 260. It was admitted in the case cited, that such a right might grow out of general usage; but here is only another sort of way; and we still want a case of customary exclusive occupation by the public. *And see Chambers v. Turry*, 1 Yeates, 167; *Cooper v. Smith*, 9 Serg. & Rawle, 26. It is not denied that the people, who are legally substituted for the king, may take a grant of soil, or an easement, or any profit or right implying exclusive occupation. They may take as a corporation; but the subject of the grant then becomes their several property, in respect to which they are considered an individual with all the incidental rights and remedies. So far from such a grant conferring a general right of way, any one who should intrude upon it would be liable to an action, unless the people in their corporate or sovereign capacity had dedicated a way over it. But the *locus in quo* is not claimed in that light. The claim is for each and all persons in the state, indeed for any one in the whole world, who shall have occasion to deposit lumber, manure or other articles on the soil of the plaintiff. The question is, can such a claim be made to any right except that of way? No claim in favor of any one is named or can be named? There is no one to take, and no one to release?

I have said that the claim of the defendant is novel. I think it will appear that by English authority binding upon us, it has

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been expressly denied, and that too in a series of instances, including *Gateward's case*, 6 Rep. 60. The action there was trespass *quare clausum fregit* and for depasturing in the plaintiff's close. The defendant justified by plea of a customary right of common for *all the inhabitants of the village of Stixwold*; and averred that at the time he was an inhabitant. On demurrer this was held bad for several reasons, and among others that the common would be transitory and uncertain; that it would follow the person for no certain time or estate, but during his habitancy; and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance. Again; it will be against the nature and quality of a common, for every common may be suspended or extinguished; but such a common will be so incident to the person that no one certain can extinguish it, but as soon as he who releases, &c., removes, the new inhabitant will have it. Again; if the law would allow such common, it would give an action or remedy for it; but he who claims as an inhabitant can have no action for it. Again; every commoner must *prescribe* in respect to some estate, not in respect to mere inhabitancy. But it is remarkable that a distinction was expressly taken "between an *interest or profit* to be taken in another's soil, and an *easement* there;" and an instance is put of a matter of exemption or discharge and of a *way*, for it is said, "they claim not a *charge*, or *profit a prendre* in the soil of another." And, it is added, "so of a custom that every inhabitant of such a town shall have a *way over such land*, either to the church or market, &c.; that is good, for it is but an easement and no profit and a way or passage may well follow the person, and no such inconvenience as in the case at bar." In short, this authority throws the right to *take a profit* exclusively on the common case of prescription in a *que estate*, and it concludes thus: "But a custom that an inhabitant or resident shall grant or take any profit is merely void." If subsequent English cases have allowed customary or prescriptive rights to invade and exclusively to enjoy the soil of another, to the permanent inhabitants of a

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certain town, they have never extended but uniformly denied it to the inhabitants of the kingdom generally. In *Sherborn v. Bostock*, Fitzg. 51, on a *habeas corpus cum causa*, it was returned that any one being indebted as executor by simple contract within the city of London, might be sued in the mayor's court. But it was perceived that a debt being transitory and following the person, any citizen happening to be in London, would be brought within the custom, and it was resolved by the whole court, "that the custom returned being general and such a one as may extend to every subject, whether a citizen or stranger, is void." In *Fitch v. Rawling et al.* 2 H. Black. 393, the action was for entering the plaintiff's close at the parish of *Steeple Bumstead* in Essex, and there playing at cricket. The defendants justified, 1. under an ancient custom for all the inhabitants of the parish to enter there and play, and 2. for all persons for the time being, being in the said parish. There was a verdict for the defendant on both pleas; but though the court held the first plea good, they held the second to be bad, and ordered judgment for the plaintiff. Buller, J. said, "I hold the other custom to be as clearly bad as the first is good. How that which may be claimed by all the inhabitants of England can be the subject of a custom, I cannot conceive. Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind can never be claimed as a custom. I perfectly agree that no action could be maintained for interruption of it, any more than in the instance put by my brother Bond of a highway." Heath, J. put the case on the impossibility of there being a grant, on which the custom proceeded. He agreed with Buller, J. and added, "The lord might have granted such a privilege as is claimed by the first custom, before the time of memory; as to the second, it is clearly bad, being for all mankind, and on that the case in Fitz. 51, is in point." I shall notice particularly but two more English cases, and these fully justify the view I have already taken of *Gateward's case*. I said that the public cannot prescribe for a profit *a prendre* in the soil of another, but that this must always be by

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an individual on a *que estate*. The further cases directly to this point are *Grimstead v. Marlowe*, 4 T. R. 717, and *Hardy v. Holliday*, cited at large by Buller, J. *id.* 718. Both were much like *Gateward's case*, presenting justifications of customary common of pasture in favor of *all inhabitants of* (the former) *a parish and* (the latter) *a borough*. There were demurrers in both cases; in the latter assigning for cause that the plea should have prescribed in a *que estate*. It is sufficient to say that in the first case all the judges agreed in what was said by Lord Chief Justice Kenyon, repeating nearly his words. He said, "The right which is claimed is to take a profit *in alieno solo*; but that, according to *Gateward's case* and the case of *Hardy v. Holliday*, cannot be claimed by custom. There may be a custom for an easement, *as a right of way, in alieno solo*; but for a profit *a prendre*, the party must *prescribe in a que estate*." Buller, J. read Lord Chief Justice King's MS. note of *Hardy v. Holliday*, in which the whole court agreed, "that where a profit is to be claimed out of another man's soil, it must be alleged *by way of prescription* and not by custom." Several cases were cited to the same effect *arguendo* in the same case by Palmer of counsel for the defendant, which he tried in vain to distinguish. The case of *Bell v. Wardell, Willes*, 202, *Am. ed.* 1802, was of a customary easement in nature of a way claimed by and allowed to all the inhabitants of the town and county of Newcastle-upon-Tyne. The right was to walk and ride for their health, and several cases are there cited both by the lord chief justice, and the editor in notes, which shew the limitation under which such customs must be taken. None of the English cases that I find, have ever allowed a custom permanently to enjoy the soil of another, to the inhabitants of a whole nation. On the contrary, they hold that the English law denies such a right. The late case of *Blewit v. Tregonning*, 3 *Ad. & Ellis*, 554, denies that a custom for the inhabitants of a parish to take a profit in the soil of another can exist.

The law of England coming to us with such restrictions, we now see why no attempt has been there made to press the doc-

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trine of dedication beyond a mere right of travel or of way. And here we may notice the great convenience of such a distinction. The right of way lies mainly in streets or roads, for we are not now speaking of the way upon the sea and its arms, nor upon innavigable rivers. The ways on land are, in general, well defined in their extent, even if we include urban commons and walks, or other places of recreation, by travel. The owner of the soil still retains many privileges: such as their being generally open and unincumbered, ornamented with trees, kept in proper repair, open to be depastured by him, &c. The remedies for obstruction are well defined and important: an indictment by the people, an action of trespass by the owner, and on the case by the traveller for special damage. Even ejectment will lie by the owner for a permanent incumbrance; whereas by a customary profit *a prendre*, as of common, and above all a right to deposit articles of merchandize by all the world, the owner is deprived of the use of the soil itself; it is covered with buildings, or by piles of lumber, heaps of manure or by merchandize, at the discretion of all people. Should he interfere by fencing or enclosing any part, he is open to indictment, the same as if he should enclose part of a highway. There is no one to release it; no power to discontinue or change it as in the case of a highway; and in the case at bar, and all like cases, the law would, for aught I see, by lending its sanction raise a perpetuity.

Then have we any adjudged cases in our own or other states or of the United States, which bind us to depart so widely from the common law? None in New-York, certainly, which go beyond the right of way or urban pleasure grounds; and I think we shall hereafter see, in *Cortelyou v. Van Brunt*, a refusal to go farther. This court have never gone beyond streets and roads; and though the court of chancery has proceeded to city and village squares and commons, it still stands far short of the doctrine now claimed of *exclusive appropriation*. If it has allowed the possibility of a grant without a grantee, and thus opened a new road to prescription, no one has yet been allowed

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actually to prescribe in a case wherein the law has heretofore held a grant impossible. Besides, grants without grantees have, so far, been confined, by our own chancery at least, to *religious or charitable purposes*. Much may depend on the statute, cited in *Hartford B. Church v. Witherell*, 3 R. S. 208, 2d ed. § 4, which seems in case of religious societies to allow of a prospective grantee, though I confess I thought, when that case was before me as vice chancellor, where it was first brought, that the grant was utterly unavailable as professing to be made in favor of a legal non-entity; and I denied the injunction on that ground. The chancellor still denied the injunction, though on another ground; and his *obiter* adoption of the cases in the United States court can hardly be said to have absolutely naturalized their doctrines even in his own court. I confess with deference, that all the learning I have seen upon the subject, and we have much in the American courts, has not yet convinced my mind that a grant is either good or can even be made so by a court of chancery, either in religious or other cases, where there is no person in existence capable of taking any thing under it. Of course it cannot be presumed. Nor am I convinced that it will help the case to call the grant by another name, that of *dedication*, the limits of which are perfectly restricted and defined by the law, and should remain so.

In *Waters v. Lilley*, 4 Pick. 145, 148, the supreme court of Massachusetts adopted the law as laid down in *Gateward's case*. The defendant fished in the plaintiff's pond, and being sued in trespass offered to prove an immemorial custom for all the inhabitants of the vicinity to take fish in the pond. Parker, Ch. J., who delivered the opinion of the court, said the custom was one that could not be sustained in law. "If such a right is available at all, it must be set up by prescription, &c. and should be pleaded with a *que estate*." He cited *Gateward's case*, and *Grimstead v. Marlowe*. A subsequent defence in the same court, which seems to me to have depended on the same principle, met with a different reception. In *Coolidge v. Learned*, 8 Pick. 504, the defendant pleaded a prescriptive right for all



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the citizens of the commonwealth to land and deposit lumber on the plaintiff's soil upon the bank of Charles river. The court were mainly occupied in enquiring into the general question whether the doctrine of prescription was at all predicable of Massachusetts, and concluding that it was, they pronounced without citing any authority, that "the right in question is a *public prescriptive right*, and as such is well pleaded." The case is indeed all fours with the one before us. A court sitting under the same system of laws, in a neighboring state, has refused to sanction such a defence. *Bethum v. Turner*, 1 *Greenl.* 111. The public had been in the habit of landing lumber from Eastern river on the plaintiff's close, at or near the shore, for thirty-five years before suit brought. On a verdict for the plaintiff, and a motion for a new trial, the decision turned mainly on the sufficiency of the proof to fix the plaintiff with knowledge and give an adverse character to the occupation. It was material, however, for the court to notice whether the defence was known to the law; in respect to which Mellen, Ch. J., who delivered the opinion of the court, thus expressed himself: "This user is urged as the foundation of a legal presumption, that the place in question had formerly been *granted as a public landing*. Numerous cases have been cited by the counsel for the defendant to establish this position, and shew that grants have been presumed after a user of little more than twenty years. With respect to these cases, it may be remarked that they relate to *claims of a private nature; of privileges or easements enjoyed by individuals*." He adds, that the presumption of a *grant* between individuals is the foundation of the defence. The customary landing on the banks of a river seems in *Pennsylvania*, to have been uniformly resisted, as affording no evidence even of a right of way. *Chambers v. Furry*, 1 *Yeates* 167, *Cooper v. Smith*, 9 *Serg. & Rawle*, 26. The extravagant claim set up in the case at bar, to cover the plaintiff's land with heaps of manure and piles of lumber, was, I think, in effect, repudiated by this court in *Cortelyou v. Van Brunt*, 2 *Johns. R.* 357. The defendant, as one of the inhabitants of New-Utrecht,

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sought to prescribe for a right of erecting fishing huts on the shore of Long Island, to subserve the right of common fishing in the sea. Mr. Justice Thompson, in delivering the opinion of the court, said, "Nor will prescription, in any case, give a right to erect a building on another's land. This is a mark of title and of exclusive enjoyment, and it cannot be acquired by prescription. Title to land requires the higher evidence of corporeal seisin and investment. Prescription applies only to incorporeal hereditaments, and whether the right claimed be considered as strictly a custom or prescription, the principle is the same; the only material distinction between them is, that one is local and the other personal in its nature."

Then is the case altered by any statutory provisions or other institutions applicable to Long Island? Or by any proceedings to create, ascertain or assert a claim to the particular place in question? There were some peculiarities in the Long Island system of roads, which led the legislature, at an early period, to embody the statute regulations for this district by themselves, 2 R. L. of 1801, p. 191, and they have been so continued in all the subsequent revisals. 2 R. L. of 1813, p. 304. 3 R. S. of 1830, 2d ed. 243. But these did not, at first, consist in any connection of highways with public landings and watering places: for, it was admitted on the argument, that the latter occur for the first time in the *statute of 1813, section 1, 2*, where they are grouped with roads, and placed under the direction of the commissioners of highways in respect to regulating, opening, and altering them, but not as to creating or discontinuing them. The landings and watering places are spoken of as *having been laid out*, or hereafter *to be laid out*, and the second section treats them as *being recorded*, and prescribes the power of the commissioners in removing obstructions and encroachments, and opening them to their recorded width. The 5th section, p. 307, gives an appeal from the commissioners to three county judges, for the purpose of reviewing any regulation of, or refusal to regulate a public landing or watering place; and directs the mode of proceeding and declares its effect. In the main, these provisions are retained by the

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revision of 1830, 3 R. S. 243, to § 1, sub. 1; *Id.* p. 251 to 253; but both acts, in respect to the mode of creation, the existence and evidence of landings and watering places, leave matters where they found them. The last revision, 3 R. S. 254, 5, seems for the first time to have given the power of inquiring summarily, through a justice and jury, into the question of encroachment. This is confined to *highways* properly so called, and the penalty of five dollars for obstruction &c., formerly given, 2 R. L. of 1813, p. 310, § 15, in respect to *highways, public landings and watering places*, is now confined to *roads and bridges*. 3 R. S. of 1830, 254, § 83. In March, 1835, the commissioners of highways of North Hempstead, assuming the power to have been conferred on them by the statute, 3 R. S. 243, § 1, caused the *locus in quo* to be laid out or ascertained as a public landing, and a jury were shortly after convened, on due notice to the plaintiff, who found and certified that he had encroached upon it. Both these proceedings were before us in May term, 1837, when the reversal of the acts of the commissioners by the county judges was affirmed; and the certificate of the jury and proceedings connected with it were refused to be considered, because not such a judicial matter as could be brought before us for review. The suit, therefore, which was by certiorari, was dismissed. 17 *Wendell*, 9, 15. Yet the certificate is still insisted upon as an answer to the action, in short, as establishing conclusively, by an adjudication involving the question of public landing, that such an easement existed. No power is given by the statute either to the commissioners to lay out, or the jury to certify encroachments upon, a *public landing* *EO NOMINE*; such power is confined to *highways*, and I should think, with the intention apparent upon the statute, to exclude any power as to the creation of public landings, even if they are to be deemed in any sense synonymous with highways. The first section, sub. 2, gives the commissioners power "to regulate the roads, public landings, and watering places, already laid out, and to alter such of them as they, or a majority of them, shall deem inconvenient." In the provisions which follow as to describing old and laying out new roads, *landings and watering places*

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are excluded all mention ; and so of the proceedings by jury to determine and certify encroachments. All are confined to *highways*. This term is said, by the defendant's counsel to be generic, and to comprehend *landings*. The selectmen in *Bethum v. Turner*, 1 *Greenl*, 111, had power to lay out *highways* ; but their laying out a *landing* and *place of deposit* was held no protection to its occupants ; and we held the same thing in respect to these very men of North Hempstead, in their certiorari against the judges of Queens, 17 *Wendell*, 9, 12.

It is clear to my mind, even if the certificate of the jury were, in a proper case, to have the effect of a judgment between these parties, that the matter was equally beyond their jurisdiction as it was beyond that of the commissioners. As remarked by Chief Justice Nelson, in the case cited, the only way in which they could act favorably to a landing, would be indirectly, by exerting their statute powers for establishing and preventing encroachment on a highway, leading to and connecting with it. In this respect, as to subject matter, the powers of the commissioners and jury are commensurate ; the commissioners may lay out *de novo*, or describe and record an old highway ; and the jury settled the question of encroachment upon highways, where the point is disputed ; but the power does not extend to landings. Independent of what I take to have been the plain intent of the legislature, a *landing*, even though for the purposes of direct transit, is more than a highway. The relative rights, both of owner and passenger in a highway, are perfectly understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman cannot stop to graze his steed, without being a trespasser ; it is only in case of inevitable, or at least accidental detention, that he can be excused even in halting for a moment. The landing of wagons, horses and passengers on the shores of a river, a sea or an ocean, even though it be upon a dedicated or recorded highway on the land connecting with the watery way, and for the direct purpose of going onward, is still a trespass on the riparian owner, unless we could suppose such acts to be performed with-

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out any contact between the vessel and the shore. In *Chambers v. Furry*, 1 Yeates, 167, the plaintiff, who owned the eastern shore of the Susquehannah river, sued the defendant, who had a right of ferriage from the western shore, in trespass for landing his passengers on, and taking them from the plaintiff's soil, with freight; for all which he was accustomed to receive ferriage. The landing and reception is said, by the case, to have been from and on board the defendant's flats, which I suppose answered to our scows. The defence was that the *locus in quo* was a public highway. The defendant failed to establish that fact; but McKean, C. J., and Yeates, J., said, "had it been a highway, would it have been a justification? The public would, in that case, have been entitled to a right of passage; but the title to the soil, the stones, the wood, or the grass growing thereon, would have still continued in the owner of the lands. The use of the ground would have been dedicated to the public for *particular purposes only*. The books lay it down that in England the right to the bed of a navigable river is presumed to belong to the crown; and of course, in such case here, to the commonwealth, *usque ad filum aquæ*; but the right to the adjoining land rests in the owner of the soil. Hence arises the right to wharves in the city of Philadelphia, and commercial ports. No one can use them without making compensation to the respective proprietors." *Cooper v. Smith*, 9 Serg. & Rawle, 26, was an ejectment against a ferryman for claiming and exercising a similar right on the plaintiff's soil, who was a riparian owner on the Youghiogany river. The court, by Duncan, J. adopted the reasoning in *Chambers v. Furry*. They say "the place where the landing was, if a public highway, in an action of trespass would not be a justification. The position of the court "that *Sumral* might lawfully ferry, and land his boats on the public road, was erroneous, for this was the very question in *Chambers v. Furry*. There are a few ferries whose landing is not a common highway." The case was now before the court on error, from the C. P. on the charge of *President Roberts*, who had used that language to the jury now quoted and denied by the court. Yet the case went

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for the planitiff, on a failure to make out an actual highway, and the judgment was therefore affirmed. But in *Chess v. Manown*, 3 *Watts*, 219, the very point was decided that you cannot moor your boat, and land from the river on a road, though it be regularly laid out and connected with the boat highway on the river. The court said, "the franchise of the public was to pass over the soil and no more." The case is the stronger as the road was laid out with its termination at low water mark, and as in Pennsylvania, it is well known that all the considerable rivers, even above tide, contrary to the rule in most of the other states, and especially here, are deemed the soil of the state, not of the riparian owners. *Shrunk v. The Schuylkill Nav. Co.* 14 *Serg. & Rawle*, 71. The right in question was to a highway over Manown's farm on the *Monongahela*, which has been judicially pronounced within the local rule. 14 *Serg. & Rawle*, 79, *per Tlghman, C. J.* Still inasmuch as there the owner has a freehold as against all except the state, down to low water mark, it was held that even a road to that point would not sanction the landing with ferry boats and passengers on his land. The amount of these cases is, that roads are made to be travelled on, and not to be occupied, much less blocked up by sloops and scows. If the contrary were allowed, the ferryman might derive a profit from his toll, which belongs to the owner, under pretence of a free passage. The intention of laying out a public highway, is to make a free passage, not a profit to the owners of water craft. The easement is for land, not water carriage, and therefore is not to be touched by the latter, without the permission of the owner.

To what cases the words *public landings* and *watering places*, which have found their way into the statute concerning Long Island are to be applied, we are still left to conjecture. The statute goes farther than to suppose a mere prescriptive or customary existence; it takes them to *have been laid out*, or *hereafter to be laid out*: so far using words applicable to highways, which are laid out by commissioners under prescribed forms: 2 *R. S. of 1813*, p. 304, 5. 3 *R. S. of 1830*, p. 243; *vid. also* 2 *R. L. of*

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1813, p. 307, § 8, and 3 R. S. of 1830, p. 255, § 93 ; yet we are referred to no power in any one or more persons to lay them out. The statute studiously avoids any such power. The attention of counsel was drawn to this subject, by what we said on repudiating the assumed power of the commissioners, in 17 *Wendell*, 11, 12. The suggestion was, I think, before counsel, when they tried *Pearsall v. Hewlett*, one of the cases now before us ; and it is now confessed that no power has been discovered in any statute or charter to lay out landings. In one case I perceive, that what was called by the act of 1801, 2 R. L. p. 193, § 5, "landing place," simply is, by the later statutes altered to "public landing place." 2 R. L. of 1813, p. 307, § 8, and 3 R. S. of 1830, p. 255, § 93. It is said that the laying out, can only mean an appropriation by public user in the nature of a prescription ; but we have, I think, seen clearly that the common law itself stands in the way of any such assumption. Other statutes, I perceive, assume that tracts of land, common to some towns, are, or were once owned by them ; 3 R. S. p. 356, § 17, 20 ; to what extent I do not know ; but in *Oyster Bay*, they are treated as comprehending beaches and marshes. *Id.* § 20. Landings and watering places on such lands would be of course, in a degree, public. In *Cortelyou v. Van Brunt*, 2 *Johns. Rep.* 357, a public landing place is presented as *recorded* in the old county book of roads. It is called a *common landing place*. The power of commissioners even to regulate watering places, on the assumption that all the neighbors had immemorially used them, has, I know, been resisted, and I think effectually. The commissioners had twice attempted to regulate a watering place in *Crab Meadow*, in the town of Huntington, Suffolk county. It was a pond, about eight rods in circumference. Pinckney, who claimed the pond, appealed to three judges of the C. P. first in 1821, when they reversed the decision of the commissioners ; and again, in 1822, when a subsequent decision of the same commissioners was affirmed, on the ground of immemorial user by the public. From the last decision, the case came before this court, (my notes say,)

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in October term 1827, when the decision was reversed. Two questions were discussed by the judges: 1. The right of the public to interpose such a claim; and 2. The effect of the first, as a bar to the second proceeding of the commissioners. The only notes I have, of the decision appear to be recent, and on what information they were made, I do not remember. The ground is not stated, and I may be mistaken in other respects; but my notes are full, that difficulties were felt in the course of consultation, as to the legal existence of such public customs; and the origin and character of the Long Island watering places were not satisfactorily explained. They were assimilated by counsel in argument to that which I have before mentioned from *Co. Litt.* 56, a., which we have seen was local to the people of a definite place. Towns are known to have common lands; and these reaching the sea shore, on Long Island, may perhaps be thrown out temporarily, or by permanent regulation, at least, for the use of the town's people. It is enough however, that we are thrown upon the common law, which does not recognize any such prescriptive easement for the benefit of a whole people. See *Manning v. Wasdale*, 5 *Adol. & Ellis*, 758.

I will merely add, upon the main question, that considering our extensive lines of coast, immense, when we take into the account our seas, lakes and rivers; the long public enjoyment throughout, of landings on mere courtesy, and under the notion, I am persuaded, of mere license revocable when the resort should become inconvenient; considering the like circumstances in respect to other objects, such as watering places at the shore and in creeks, springs and wells; a rule of law, which should admit the possibility of turning such enjoyment into prescriptive and absolute right on the part of the public, would open a field of litigation, which no community could endure. What is still worse in a moral point of view, it would be perverting neighborhood forbearance and good nature, to the destruction of important rights. We shall do quite enough for the public, I imagine, by giving them *dedicated streets and ways*; and at any rate, if we shall hereafter

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go with some courts, in refusing to a man the right of modifying a tract of his own land, because it has found its way on to his map, or been talked of by him as a public square of a city or village. For aught I know, we must do this even as to whole farms, which modern speculation may have dedicated as pleasure grounds for lithographic cities. In the court where we sit, however, the doctrine has not yet been practically extended to subserve the purposes of pleasure or fancy.

Our remarks, so far as they regard the identity of the *landing* with a mere *right of way*, are made more especially in respect to the defence of Mr. Hewlett, who is sued by the present plaintiff, for acts which he claims to have performed as a *commissioner of highways*, in working the *locus in quo*, and maintaining his ground there, by assailing the plaintiff, who came and sought to expel him. Neither his own proceedings, in conjunction with his brother commissioners, nor those before the justice and jury, can protect him, for there was no jurisdiction. So far as the evidence offered in that case went to a *user*, for the purposes of a public landing, we have seen that it was inadmissible, as not going to confer a right on any one.

In no possible view, if we are correct in saying that dedication is predicable only of a *highway*, can the defendant *Post* be protected throughout, for he not only entered and removed the plaintiff's fence, but deposited manure on his land. Clearly this would be an injurious excess, and a trespass upon the soil of any highway. But Hewlett offered to show in addition, that he confined himself to a *dedicated highway*. He too, entered, not for the purpose of passage, but to repair by ploughing down a knoll into a marsh. I say nothing of the supposed benefit to the plaintiff. It was correctly answered, nor is any point made to the contrary, that an owner's soil can not be legally entered and worked by another, under any pretence of supposed benefit. As a private citizen, and without authority from the *overseer of highways*, Hewlett might pass, but could not legally stop and make repairs.

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Had Hewlett offered to prove that the *locus in quo* was a public highway, and that he was simply engaged in repairing it as such, under orders from the town commissioners, I think the proof should have been received. The objection to that on the part of the plaintiff is, that the *locus in quo* having become a *public highway by dedication*, its working and repair, if allowable at all, belonged to those *who used it*, and not to the commissioners; that to warrant the interference of the town authority, it must have been recorded. That certainly is not a universal requisite; for the statute itself places roads, which were used 20 years next preceding 1797, though not recorded, on the footing of those which are. 3 R. S. 253, § 82. We think a road dedicated to the public, and accepted by the commissioners, may, and must be repaired in the ordinary way. The point was directly resolved in *State v. Campton*, 2 N. H. Rep. 513, on full consideration; and in England, it is well settled, that the parish, (which for this purpose answers to our town,) is *prima facie* bound to repair a public road in all cases; and that if the duty lie upon any other, some special reason should be shown. *Woolr. on Ways*. 76, and the cases there cited. *Ashurst, J. in Rex v. Sheffield*, 2 T. R. 106, 111. There may be an objection to a *commissioner* interfering personally, and not by an *overseer*; but we need not inquire farther of his power over the premises as a highway, for he *did not come to it* as being a highway; his proposition at the outset was to prove it a *public landing place, and place of deposit*; and that the commissioners met and determined to regulate, repair, and alter it as such, and that he was acting under their determination. On the judge rejecting that evidence, he offered to show *in addition*, that the place was a *highway*. He was there without any order to work it *as such*, and comes back therefore to the rank of a private person. No power existed to make the order in respect to a public landing place or depot, to be made out by prescription or custom; for we have seen that none such can exist, and none other was offered to be shown.

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In short, the *landing* and *depot* were the ground on which the defence turned in both causes. They were allowed as a defence in *Pearsall v. Post*, where the verdict was for the defendant, and in which there must be a new trial. In *Pearsall v. Hewlett*, the defence was disallowed, and a verdict found for the plaintiff, and therefore in that cause, a new trial should be denied.

Ordered accordingly.

END OF JULY TERM.

# CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF NEW-YORK,

IN OCTOBER TERM, 1838—IN THE SIXTY-FOURTH YEAR OF THE INDEPENDENCE  
OF THE UNITED STATES.

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THE MAYOR, &C. OF THE CITY OF NEW-YORK *vs.* STONE  
and others.

Under the act subjecting the city of New-York to the payment of damages occasioned by the destruction of buildings by order of the Mayor, to prevent the spreading of a conflagration, no one but *owners* or persons having *an estate or interest in the building destroyed* are entitled to claim damages.

An *owner* or *lessee* who has goods on hand as a factor or commission merchant, and has a *lien* upon the same for *charges* or *advances*, may claim damages to the amount of his *lien*; but he is not entitled to claim the *value of the goods* for the benefit of the owner.

A person having *goods stored in a building destroyed*, of which he is not a *tenant* or *occupant*, is not entitled to be a claimant under the act.

It is no bar to a claim that the party asking an assessment had effected an insurance upon the property destroyed, and has received moneys on such insurance.

*Interest* upon the value of the goods lost, is a proper item in the estimate of damages.

This case came before the court on a return to a *certiorari* made by the common pleas of New-York, to review the proceedings

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Mayor, &c. of New-York v. Stone.

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had in that court for the purpose of assessing the damages sustained by the defendants in error in consequence of the *destruction of a building*, of which they were *lessees*, by order of the mayor of New-York with the concurrence of two of the aldermen of the city, by virtue of the powers conferred upon him by the 81st section of the act particularly relating to the city of New-York, 2 R. L. 368, during the *great fire* in that city, which commenced 16th December, 1835. The return shewed, 1. A *precept* issued by the mayor commanding the sheriff to summon a jury to enquire, &c. 2. An *inquisition* of the jury finding that the defendants in error were *lessees* of a building destroyed, and assessing their damages at a certain sum. 3. An *affidavit* of the counsel of the corporation detailing the facts elicited on the inquiry, as that the defendants in error had at that time goods in store to the amount of \$225,743.70, of which goods a part only amounting in value to \$4,586.52 belonged to them, and the residue was held by them as *factors* or commission merchants, and that a portion of the goods belonging to them to the value of \$1,614.80 was saved; that the goods in the store at the time of the fire were *insured* to the amount of \$106,500 on policies of insurance, of which sum \$60,960 had been paid by the insurers, and received by the defendants in error. 4. An agreement that the assured should pay over to the insurers such proportion of the damages which should be recovered in their proceedings as should belong to them; and 5. A rule of the common pleas setting forth the inquisition and stating the filing of the affidavit of the counsel of the corporation, and then *confirming* the inquisition. There were two other cases brought up at the same time in which the proceedings were the same as above stated, except that by one of the inquisitions damages were assessed and allowed to several individuals without stating the *interest* they had in the building destroyed, or the *nature of the loss* sustained, as thus "and they further upon their oaths say that George Meyer having an interest in the said premises Number 57. Water-street, has sustained damage by means in the said writ mentioned over and above his costs and expenses of the said

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"inquisition and proceedings to the amount of \$4,345.38, beside his expenses incurred about the said injury, assessment and proceedings to be taxed and allowed." In reference to which assessment in favor of George Meyer the counsel for the corporation in his affidavit stated, "that a claim was also made by and on behalf of George Meyer for merchandize destroyed in the cellar of the said building No. 57, Water-street, valued at \$4,959.50, at a credit price; in relation to which claim it appeared in evidence that the whole of the said merchandize belonged to persons in London, and had been *consigned* to the said George Meyer for sale; and that the same was deposited by him on storage with the said Lansing and Monro in the said cellar." The counsel for the corporation further stated in his affidavits in one or other of the cases, that the judge presiding at the taking of the inquests charged the jury in substance: that a *lessee* of a building destroyed was entitled to recover the full value of goods lost by such destruction, *although he held them merely as a factor* for sale on commission, because a commission merchant, having goods on hand for sale, upon which he had made advances or had a lien, was in law deemed the owner of the goods and was entitled to recover the full value thereof in his own name, subject only to an account with his principal; that the circumstance of the *goods having been insured*, and of moneys having been received on such insurance, was not a ground of diminishing the recovery inasmuch as the assurers had a right by substitution to indemnity in the name of the assured under the act; that persons having property *stored in a building, although not tenants or occupants* thereof, were protected by the act equally with owners, lessees or occupants, and might be claimants under the act; that it made no difference whether the property belonged to the claimant in his own right, or was held by him as a consignee, commission merchant, factor or agent, and that the jury would be warranted in allowing *interest* upon the value of the goods destroyed; which charge was excepted to by the counsel for the corporation. The jury in making their assessment *followed the instructions of the judge*. The causes were argued by

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Mayor, &c. of New-York v. Stone.

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*R. Emmet & G. F. Talman*, for the corporation.

*D. Lord, jun. & S. A. Foot*, for the defendants in error.

*By the Court*, NELSON, Ch. J. We have already determined, in construing the 81st section of the act relating to the city of New-York, that the owner or lessee of the building destroyed was entitled to an assessment of damages for the loss sustained in respect to merchandize, and the other personal effects belonging to him and contained therein. 17 *Wendell*, 285. It was not then important to consider whether the owner of the goods, who had *no estate or interest in the building*, came within the purview of the statute; that question is now presented; and also whether, if he possess such interest, he can claim damages for goods held by him for sale on commission.

In respect to the first question, the statute, I am of opinion, is too explicit to admit of doubt. It provides that any person *interested in the building* may apply for the precept, and that the jury may assess the damages which the "*owners of such building, and all persons having an estate or interest therein,*" have sustained. The term *interest*, (the only word upon which a doubt can possibly be raised,) in the connection in which it is found, clearly imports some share in the *building* itself, and was intended, probably, if not to be regarded as synonymous with *estate*, to include any degree of interest or claim therein which might not, in technical language, fall within any of the subdivisions of estates. It may well however, be regarded as synonymous, as the term *estate*, when used in reference to land, signifies simply an *interest* therein; 2 *Black. Comm.* 103; and both terms are in common use in the transfer of titles, as may be seen in the various forms of conveyance. The word *interest* is also frequently used by the legislature in respect to *real estate*. 1 *R. L.* 503, § 1. *Laws of 1816*, p. 63, and others which might be referred to.

The second question is more embarrassing. So far as *charges or advances* upon the goods held on commission exist, the lessee must be considered, to this extent, as owner having a *lien* upon

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 Mayor, &c. of New-York v. Stone.
 

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them to such amount ; but beyond this there is difficulty in discovering how his rights or *interests* are connected with the loss or damages incurred. The principle and provisions of the statute are not like those of Ed. 1, commonly called the statute of *hue and cry*, or 4 Geo. 1, called the *riot act*, or 9 Geo. 1, called the *black act*, by which the inhabitants within the hundred are made responsible to the party aggrieved, either in terms or in legal effect, for the damages sustained. There no restriction existed in respect to the description of persons to be indemnified ; *whoever* was *robbed*, had his *dwelling demolished* by a riotous assemblage, or his cattle *maliciously maimed*, &c. could prosecute the hundred and recover his damages. This body was said to have been simply substituted in place of the trespassers ; and any person who could maintain the action of trespass at common law might well pursue the remedy under these statutes. They gave an absolute right of redress to the party injured, and whether obtained through his bailee, trustee, agent or servant, was altogether unimportant as respected the defendants, provided the forms of law authorized the remedy in the names of the parties suing, so as the recovery should be conclusive upon the real party in interest ; because if the suit could not be sustained by these persons, the owner himself might bring it. Hence it was held, that a servant robbed in his master's absence might maintain the action, and declare that he was possessed *as of his own proper goods*, or the master might bring the action in his own name ; so the servant might recover for the *whole*, where part belonged to him and part to the master ; but if the robbery was in presence of the master, then he alone could sue. 3 *Bac. Abr.* 512. 2 *Salk.* 613. 2 *Saund.* 379, 380, and *n.* 15. See also note to *Pinkney v. Inhabitants of East Hundred*, *id.* 374, 379.

Here the damages to be assessed and recovered are expressly limited to persons possessing *an estate or interest in the building* destroyed ; not given generally to the *party aggrieved*. It is the damages which this particular description of persons, and none else, have sustained, which are provided for by the statute. We must remember too, that the act of pulling down the building was



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lawful at common law ; that here is no substitution of the city in the place of trespassers, to be held accountable upon principles regulating the damages, the same as if claimed against them ; and that the damages rest solely, both as regards the *right* to recover and *liability* to pay, upon the terms of the statute itself. I admit *as to the claimant* the statute is remedial, and should be liberally expounded in respect to him ; but this principle of construction will not carry us out of its provisions and extend the remedy to persons not included, and in respect to whom the *damages of the claimant* himself have no necessary connection. The plain import of the statute is derived from its terms, being to keep harmless *persons interested in the buildings* pulled down ; when it is so expounded as to accomplish this, its object is completely attained.

If the act (as in the acts against the hundred) had provided indemnity generally to all persons sustaining damages, then *the right* to compensation being secured to all, the only question that could arise would be in respect to the form of the *remedy* ; and in analogy to the course of proceedings at common law, there could have been no great difficulty in permitting the party in possession of the goods, such as consignee, bailee, &c. to recover for the owner. *Possession alone* might then have sufficed for the purpose of the remedy under the law, leaving the plaintiff in the action to settle with the party in interest. But how can we say that the owner may recover here through his agent when the corporation are not made liable for the loss ? The question is not one of remedy, but of *right* ; the bailee is met by the objection that the owner is not provided for in the particular case ; it not coming within the scope and meaning of the act ; *damages* are given to *the party* showing *an interest in the building* ; those which *he* has sustained, not the bailor or some third person. To say therefore that he may recover for goods belonging to the consignee, bailor or the like, would be violating the principle of the statute through the form of the remedy. Where the case of the claimant comes within the provision of the law, and he is entitled to damages, any remedy for the loss that he may have against

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 Johnson v. Moss.
 

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third persons is not to be regarded ; it is enough for him that he may look to *that* given to him under the statute.

Interest was properly allowed ; it entered into an estimate of the loss which the party had sustained, and was a part of the damages.

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## JOHNSON vs. MOSS.

An affidavit to obtain an attachment against a party for having departed the county with intent to defraud his creditors, is good although the applicant swears only to his belief as to the intent, provided he sets forth the facts and circumstances upon which such belief is founded.

Where the proceeding is under the provisions of the Revised Statutes, it is no objection that there are more than *four days* between the take and return of the process.

A return of a constable, that by virtue of an attachment against A. B. he had levied on certain property, will be intended to be a return that he had levied upon the property of the defendant.

On a common law certiorari, if the justice had jurisdiction, his judgment will not be reversed, though it be rendered on an insufficient declaration or defective proof; nor will such judgment be reversed, although it be for an amount nearly double the sum alleged by the plaintiff to be due to him on obtaining the attachment.

COMMON law certiorari to a justice's court, returnable in this court. Moss, on the 16th May, 1836, sued out an *attachment* against the goods and chattels of Johnson. He made affidavit that Johnson was indebted to him in the sum of \$27, over and above all discounts ; that he *believed* Johnson had departed the county with intent to defraud his creditors, and then stated the facts and circumstances on which he grounded his belief, viz. that Johnson was a man of but little property and owed a good many debts ; that he departed the county of Otsego in a clandestine manner in *March* last, taking with him a span of horses, wagon and harness, and most of his property liable to execution ; that his family said he had gone to Albany, but the applicant for the attachment had been informed by one of his neighbors that he was in Tioga county : all of which he believed to be true. The justice issued an attachment, dated 16th May, returnable 23d

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May. The constable made return that he had levied upon *one fall, &c. of a table*, and had left a certified copy of the attachment and an inventory at the dwelling house of the defendant with his family, he not being found in the county; the attachment was not served personally. On the return day the plaintiff appeared, but the defendant did not appear; the plaintiff declared for goods, wares and merchandize, &c. &c., and called a witness who gave evidence of the plaintiff's demands. The justice rendered a judgment for \$45.83, besides costs. The case was submitted on written arguments. The plaintiff in error insisted, 1. That the affidavit was insufficient; 2. That the attachment was erroneous in having *six days* between its teste and return, whereas the process should have been a summons returnable not more than four days from its date, *Statutes, sess. of 1831, p. 403, § 33*; 3. That the *return* of the constable was insufficient, inasmuch as it did not show that any property was levied upon, or that what was levied upon was the property of the *defendant*; 4. That the declaration was insufficient; and 5. That the judgment was manifestly unjust, it being for \$45.83, when the indebtedness was alleged to be only \$27.

*H. Bennett*, for the plaintiff in error.

*Morehouse & Lathrop*, for defendant in error.

*By the Court, BRONSON, J.* This attachment issued under the provision, 2 R. S. 230, § 26, 28, as amended by *Laws of 1831, p. 404, § 35*, on the ground that the defendant had *departed from the county* where he last resided, with intent to defraud his creditors. In stating the *intent* with which the defendant departed, the applicant as must generally be the case, only swears to his *belief*; but the facts and circumstances on which the application was founded, are directly and positively alleged. The case does not fall within those of 10 *Wendell*, 420, and 14 *id.* 237.

The attachment did not issue against the defendant as a *non-resident*, *Laws of 1831, p. 403, § 33*, but on the ground that the

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Johnson v. Moss.

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defendant had *departed from the county with intent*, &c. 2 R. S. 230, § 26, and in such cases there must not be less than six nor more than twelve days between the teste and return of the process. *Id.* § 30. There is, therefore, nothing in the objection that there were more than four days between the teste and return of the process.

The justice states that the constable returned that he had attached *a table*; the return itself seems to have been that the constable had levied upon *one fall, &c. of a table*. Whichever may be correct, it is impossible to maintain the objection that *no property* was levied on. Again, it is said that it does not appear that the levy was on the *defendant's* property. The attachment required the officer to take the *defendant's* property, and the constable returns that *by virtue of the attachment* he has levied on *a table, &c.* The fair and reasonable intendment is, that the property taken belonged to the defendant. The return was, I think, sufficient.

Should it be admitted that the declaration was defective, we could not interfere. This is a common law certiorari, and we cannot look beyond those questions which go to the jurisdiction of the justice. *Birdsall v. Phillips*, 17 Wendell, 464. On the return of the attachment, the previous proceedings having all been regular, the justice acquired jurisdiction to hear and render judgment. If he did so upon an insufficient declaration, or on defective proof, the error cannot be reached in this form. But the declaration is well enough.

In the affidavit on which the attachment issued, the plaintiff stated his claim at \$27, and judgment was rendered in his favor for \$45.83, besides costs. It is not improbable that injustice has been done the defendant, but a common law certiorari will not help him.

Judgment affirmed.

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Johnson v. Moss.

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## JOHNSON vs. MOSS.

Whether an action will lie on a judgment obtained when the process is by *attachment* until the property taken on the attachment be sold ; and whether a second attachment can be sued out on such judgment before the property taken on the first be sold, *quære*.

But if such proceedings be erroneous, they cannot be corrected on a common law certiorari.

Common law certiorari. From the return in this case, it appears that on the ninth of *June*, 1836, Moss, the plaintiff below in the last preceding case, (*ante*, 145,) sued out another *attachment* against Johnson, by virtue of which the constable levied upon a *span of black mares*. On the return of the process, the plaintiff declared on the judgment obtained on the 23d May, and on production of proof, the justice rendered a second judgment for the plaintiff.

*By the Court*, BRONSON, J. The questions decided at this term in a case between the same parties, (see last preceding case,) dispose of all the points in this, except the following: This suit was also commenced by attachment ; the defendant was not personally served, and did not appear on the trial. The plaintiff declared on a judgment, which probably was the judgment recovered in the first action. It is objected that no action will lie on the first judgment until the property taken on the first attachment has been sold. See *Laws of 1831*, p. 405, § 39. The second attachment was levied on other property than that taken on the first ; and it is said that this could not be done until the property first taken had been sold. If the objections are well founded, they cannot be remedied by a common law certiorari. On the re-turn of the attachment, all things being apparently regular, the justice had jurisdiction to hear the cause and render judgment.

Judgment affirmed.

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Starr v. Child.

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STARR and others vs. CHILD and others. *Remitted 4 Dec 36*

Where in a conveyance of premises situate on the bank of a river not navigable, the lines are stated to run from one of the corners of the lot to the river and thence along the shore of said river to a certain street, the grantee takes *ad flum aqua*. See dissenting opinion of Mr. Justice BRONSON.\*

THIS was an action of *ejectment*, tried at the Monroe circuit in October, 1835, before the Hon. ANDREW GARDINER, then one of the circuit judges.

The plaintiffs claimed title to the premises in question on the following state of facts: It was admitted that previous to the 13th August, 1817, Charles Carroll, William Fitzhugh and Nathaniel Rochester were seised of a tract of 100 acres of land covering the premises in question, and that both plaintiffs and defendants claim under that title. The plaintiffs then produced in evidence, 1. A *partition deed* between Carroll, Fitzhugh and Rochester of the above tract, bearing date 13th August, 1817, by which *mill seat lot number twelve* (the premises in question,) among other parcels, was allotted to Rochester; 2. A second partition deed between the same parties, bearing date 19th September, 1822, whereby certain alterations were made in the numbers and

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\* Mr. Justice Bronson holds that the grant of soil *adjacent* to a river not navigable, does not necessarily pass the fee of the bed of the river. He admits that the grantee in the absence of all proof to the contrary is *prima facie* or by common presumption the owner, but insists that such presumption like most others may be rebutted; and is of opinion that under the circumstances of this case the presumption is destroyed.

In the discussion of this case, the judge advances the following proposition: *Navigable rivers, whether fresh or salt, and without reference to the flow and reflow of the tide, belong to the public.* The rule of the common law that the flow and reflow of the tide is the criterion by which to determine whether a river is public or not, not being applicable to our great fresh water rivers, forms no part of the law of this state.

Whether a riparian owner, who claims in an action of ejectment to recover *ad flum aqua*, is not bound to show the river to be unnavigable, *quæritur*.

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Starr v. Child.

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size of various mill-seat lots ; and other mill-seats laid out and divided between them ; 3. A deed from Rochester to *William Cobb*, bearing date 9th November, 1819, conveying "All that certain piece or *parcel of mill-seat lot No. 12* in the village of Rochester, beginning at the northwest corner thereof *on the south bounds of Buffalo-street*, running thence southwardly along the east bounds of the mill-yard and at right angles with Buffalo-street 30 feet ; thence eastwardly parallel with Buffalo-street *about 45 feet to the Genesee river* ; thence northwardly *along the shore of said river to Buffalo-street* ; thence along the south bonds of Buffalo-street westwardly to the place of beginning : *together with a privilege of taking water from the present mill-race* near the mill now occupied by Bissel & Ely ; such water to be conveyed in front of and near the said mill and *below the surface of the ground*, to be kept well covered so as not to obstruct the passage and use of the mill-yard &c. &c." (prescribing the quantity of water to be used ; giving a right in common to the use of the *mill-yard* fronting the mill occupied by Bissel & Ely and extending to the said lot number *twelve* ; and subjecting the grantee to a proportion of the *expense of repairs* on the dam and raceway, &c. &c. ; ) and 4. The plaintiffs produced in evidence a deed from the said Nathaniel Rochester to *Thomas Morgan*, bearing date on the same day with the deed last mentioned, conveying the *residue* of the said mill-seat lot No. 12 to the grantee, in which the premises conveyed are described as beginning at the *southwest corner* of the premises conveyed to *Cobb*, running thence southwardly along the east bounds of the mill-yard 25 feet ; "thence eastwardly along the north bound of an alley and parallel with Buffalo-street, to the *Genesee river* (nearly fifty feet ; ) *thence northwardly along the shore of the Genesee river* to William Cobb's corner ;" thence to the place of beginning. "*Together with the privilege of taking water from the present mill-race,*" &c. &c. (containing the same provisions as in the deed to Cobb.) After the production of those deeds, the plaintiffs deduced a regular title under the same to themselves. The judge charged the jury that upon

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a true construction of the deeds executed by Rochester to Cobb and Morgan, the grantees *had obtained title to the centre of the Genesee river*, and that title having become vested in the plaintiffs, he directed the jury to find a verdict for them, which they did according to such direction. The defendants having excepted to the charge of the judge, now moved for a new trial.

*S. Beardsley*, (Attorney-General,) for the defendants, insisted that though it should be admitted that the original proprietors of the 100 acres, under whom the plaintiff's claim, might have held to the centre of the river, it did not follow that *Cobb and Morgan*, under the conveyances to them, could set up a similar claim. In the sale of a *village lot* situated on the bank of a river, such a construction should not be given to the conveyance, as that the grantee should take the fee of perhaps four times as much or more land as was manifestly intended to be conveyed, especially when, as here, there are metes and bounds, the lot is confined to the *shore* of the river, and the *terminus* is a *street*. The *shore* of a fresh river is where the land and water ordinarily meet; 6 *Cowen*, 547; whilst the *shore* of the ocean is that portion of land lying between high and low water mark. 6 *Mass. R.* 436. Allowing the legal presumption *prima facie* to be, that the owner of the bank is the owner of the stream to the middle thereof, such presumption like all other presumptions may be rebutted; 3 *Kent's Com.* 427, 428, 432; and here it is rebutted by the very terms of the conveyance limiting the grant to the shore of the river. If it clearly appear that it was intended to limit the grant to the *bank* of a river, it will be limited accordingly. 17 *Wendell*, 596.

*O. Hastings*, for the plaintiffs, contended that according to the settled rules of construction in cases of this kind, the plaintiffs took to the centre of the stream; and that there was nothing in the description of the premises in this case going to show a different intention. The length of line running *to the river*, is indefinite, and cannot be satisfied without reaching to the centre of the river; and the words thence *along* the shore of the river,



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cannot be construed as synonymous with the words, thence *upon* the shore of the river.

*By the Court, COWEN, J.* The counsel for the plaintiffs adverted on the argument to the evident purpose for which this lot, No. 12, with other lots, were laid out along the river, among the original proprietors. He insisted, that granting them as *water-lots* looked to the enjoyment of hydraulic privileges; and it would, no doubt, be strange, that after deliberately arranging and conveying lots for such an object, the law should cut off the purchasers from the river, by a puzzlement to be raised on a few equivocal words in the grant.

But there is no necessity for looking to extrinsic circumstances. There can be no question, that the deeds to Cobb & Morgan, on their face, invested them with a fee simple in the *bank* of the river. The south line runs about 42 feet *to the Genesee river*, thence northwardly, *along the shore of the said river to Buffalo-street*; and it is insisted by the counsel for the defendants, that these latter words are so strong, as to subvert the plain meaning of the former words *to the river*, and tie up the grant to the shore. But suppose we were to expunge the words *to the river*, and take the *shore* as the boundary: the grantees became proprietors of the *shore*; which when applied to a fresh water river, means the *bank*. *Johns. Dic. quarto. Shore and bank*, signifies the earth arising on each side of the water. *Id. Bank*. And then, says Sir John Leach, V. C., *Wright v. Howard*, 1 Sim. & Stu. 203, "*Prima facie*, the *proprietor* of each *bank* of a stream, is the proprietor of half the land covered by the stream." The *bank* and the *water* are correlative. You cannot own one without touching the other. But the *bank* is the principal object; and when the law once fixes the proprietorship of that, the soil of the river follows as an incident, or rather as a part of the subject matter, *usque filum aquæ*. Lord Hale puts it that fresh rivers do, *of common right*, belong to the owners of the soil adjacent. *De Jure Maris*, ch. 1. 6 Cowen, 537. The law does not stop to criticise the words by which a man is made owner: it enquires, Is he the *shore* owner? If that be so, he

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touches the water. *Per Marshall, C. J. in Handly's lessee v. Anthony*, 5 Wheat. 385. It is conceded that the words *to and along the river*, would include the stream. What difference, I ask, between that and *to and along the shore*? A difference of words signifying the same thing. In either case, taken literally, and according to common understanding, they carry you to a line intermediate the water and the land, and touching both. How do they take more? Upon construction of law, which does not require express words for the grant of every part, as houses, fences, mines, or the elements of water, or air, which all pass by the word *land*; and, as a grant of land by certain boundaries, *prima facie* passes all such parts to the grantee, *usque ad cælum et ad inferos*: so, within the same principle, it passes the adjoining fresh water stream, *usque ad filum aque*. The passing of the one kind may just as well be questioned as another, not only in the eye of the law, but of common sense and reason. Within the first maxim it is said, one shall not build so as to overhang another's premises, darken his lights, or confine the air: and surely it would be more absurd for the law to give a man the shore or side of a fresh water river; and yet, by saving the bed to the grantor, make the owner of the land a trespasser, every time he should slake his thirst or wash his hands in the stream. In *Gavit's administrators v. Chambers*, 3 Ohio Rep. 495, a case by which the supreme court of the state of Ohio adopted the doctrines of Lord Hale, they say, "a river consists of water, bed and banks." By running up or down, or along either, therefore, you touch the river within this case. I have said that *along the shore* is the same thing. I admit it is not critically correct to say the *shore* of a river. The term belongs in its strict sense to the ocean. Dr. Johnson says, it applies to a river only in a secondary, or, as he calls it, a *licentious* sense. "Beside the fruitful *shore* of muddy Nile." *Johns. Dict. 4to. Shore*. Yet, it is sometimes so applied in legal proceedings. The compact between Virginia and Kentucky speaks of the *shores* of the Ohio; which word *shores* was treated by C. J. Marshall, in *Handly's lessee v. Anthony*, as the same with *side* or *bank*. We know it means the same in common understanding

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among us, which must govern in the construction of a conveyance.

It is true that parts of the thing may be excluded or excepted from the grant, or may exist in separate hands by prescription ; or they may be granted by name together with the land ; but in no case does the mere omission to mention them operate as an exclusion. No matter how particularly the area of the land may be described ; no matter how definitely bounded, it will carry every part, whether above, below, or collateral. That this rule in respect to the soil of fresh water rivers has long practically prevailed, may be seen in the books and authorities which I collated in 6 *Cowen*, 543 to 551. It follows, also, I think, conclusively from the cases there cited, that if there be an exception or exclusion of the part, the burthen of showing that, lies on the side of the party who affirms it. The exception is to be raised like that to the right of using a stream running across another's farm. It may be expressly reserved for the grantor's mill below, or there may be an adverse user of twenty years, &c. all of which is very fully considered in many cases. There is but one difference between a stream running by the side of a man's farm and one which runs through it ; in the former case he of course owns but half, and in the latter the whole of the ground covered by the stream. In *Gavit's administrators v. Chambers*, the plaintiffs had taken possession of the bed of the Sandusky river, built a mill, and sued the defendants for building below and flowing back the water upon the mill. The defendants denied that the plaintiffs owned the bed of the stream ; for they claimed under a conveyance from the United States bounding them on the bank ; and, indeed, the area of the river to high water mark was deducted by the United States, and only lands on the shores paid for. Yet the bed of the stream was held to pass. Here was every thing but an express exception by the United States. They had included the river in their surveys ; but deducted the bed from the price and bounded the patentee on the banks. Yet what say the court ? They ask, " at what point does the right of the owner of the adjoining lands terminate? on the top or at the bottom

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of the bank? at high or low water mark? does his boundary recede or advance with the water, or is it stationary at some point? and where is that point? who gains by alluvion, who loses by the direptions of the streams? No satisfactory rules can be laid down, in answer to these questions, if the common law doctrines be departed from ; and if it be assumed that the United States retain the fee simple in the beds of our rivers, who is to preserve them from individual trespasses, or determine matters of wrong between the trespassers themselves? It cannot be reasonably doubted that if all the beds of our rivers supposed to be navigable, and treated as such by the United States in selling the lands, are to be regarded as unappropriated territory, a door is opened for incalculable mischiefs. Intruders upon the common waste would fall into endless broils amongst themselves, and involve the owners of adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects for individual scramble, necessarily leading to violence and outrage." The picture is a strong one ; but it comes short of life, if we apply the strict construction there contended for by the defendants to the *water lots* of the Genesee at Rochester, and the hundreds of other streams in our manufacturing districts. It is said by Chancellor Kent, speaking of the cases cited in 6 Cowen, 544, "They demonstrate the existence of the rule that a grantee bounded on a river, (and it is almost immaterial by what mode of expression,) goes *ad medium filum aquæ*, unless there be decided language showing a manifest intent to stop short at the water's edge." 3 Kent's Comm. 429, 3d ed. note. We may ask, looking at the whole of the books and the honesty of the transaction, what ought the grantor, whether United States, state or individual, to do when the patent or grant extends to the shore, but the grantor yet means to except so important a part as the adjoining stream? The obvious answer is, let the grant state the exception in terms. Otherwise, as the law has long been understood, the allowance of an exception would operate as a fraud, gross in its character, and dangerous to a very large portion of the community.

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There will be seen, moreover, a very distinct and strong tendency in the cases I have cited, to turn every doubt upon expressions which fix the boundary next the river, in favor of a contact with the water. The words which in those cases and others have created the most frequent difficulties are where the *termini* of the river line stand on the bank at some distance from the stream, and the line is prescribed to run between them, "along the river," or "up the river," or "down the river," or the like. It has been contended in such cases that the call may well be satisfied by a direct line between the *termini*, irrespective of the immediate margin; or by following at a distance from the margin, the meanders of the stream, where the words require that. But all such language has been held to fix the boundary upon the river. *Rogers v. Mabe*, 4 Dev. 194, 195, and the cases there cited. And see *McCullock's lessee v. Aten*, 2 Ohio R. 307, and *Fleming v. Kenny*, 4 J. J. Marsh. 157. These cases show, what it is very difficult for the human mind to resist, that the parties never mean to leave a narrow strip between the land and the river, merely because some stake or tree, or even all the stakes and trees of the line, stand at a slight distance from the river. The expression of an intent to run the line along the stream, reaches a distinct natural monument, which overcomes the others. They are rather intended to indicate or point down to the *termini* of the water line. In *McCullock's lessee v. Aten*, the court say, "the boundaries described as corners are found at a considerable distance from the water's edge." One of the *termini* was an oak tree, and the other a post; and the line was to run between these *down the creek with the several meanders thereof*, 207 perches. The court say it is not unfrequent that both corner and line trees stand at a greater or less distance from the actual line. "The nearest and most permanent trees are usually marked. A tree marked as a corner upon the bank of a stream, never can stand upon the water line at low water mark; and where the call is for the meanders of a stream, the corner is not supposed to be exactly in the line. The fact that the marked corner called for stands *four rods* from the water, does not

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create any ambiguity in the terms *down the creek with the several meanders thereof*. They import the water's edge, at low water, which is a decided natural boundary, and must control a call for corner trees or stakes upon the bank." I am unable to perceive any difference between the words there used and the words in the deed to Cobb, "along the shores of said river to Buffalo-street," and even had both *termini* of this *water line* stood at a short distance from the river, still the *shore*, the immediate side of the river, would have been the conspicuous and controlling monument, within the case of *McCulloch's lessee v. Aten*. This great anxiety to connect water with the main premises in the conveyance, and give a right of entry for its full enjoyment, runs through the whole history of the law. If it cannot give the land under water as parcel of the grant, it will save the water alone as an appurtenance. Thus in *Nicholas v. Chamberlain, Cro. Jac.* 121, it was held, "that if one erect a house and build a conduit thereto in another part of his land, and convey water by pipes to his house, and afterwards sell the house with the appurtenances, even though he except the land, yet the conduit and pipes pass with the house, because it is necessary, *et quasi* appendant thereto."

But the grants to Cobb and Morgan were not embarrassed by any monuments, having the appearance of conflict with the lowest verge of the shore. The south line runs to the *river* itself, and then northwardly along its *shore* to the street. It is said the street terminates at the bridge, which extends out and meets the street a short distance from the river, and that the latter *terminus* must therefore be a like distance from the river. But there is no such fact apparent upon the case. *Non constat*, but the bridge may be a continuation of the street; and probably such is the fact. That being so, it is impossible to distinguish this from the case of *Jackson v. Low, 12 Johns. R.* 252, 255. There the line ran *to the creek and up the same* to a certain point. The court said, "the terms, *and up the same*, necessarily imply that is to follow the creek according to its windings and turnings; and *that must be in the middle or centre of it*. The rule is well set-

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tled, that when a creek not navigable, and which is beyond the ebb and flow of the tide, forms a boundary, the line must be so run." So in *Fleming v. Kenney*, the court said the expressions, "*beginning on the bank of the creek, thence up the creek, with its meanders, import literally, that the margin of the creek, is the boundary.*" Thus, I think, we are brought clearly to the river, and are continued there. And we have seen the settled common law consequence, the soil passed *usque ad flum aquæ* ; and a new trial should be denied.

New trial denied.

Mr. Justice BRONSON dissenting, delivered the following opinion :

BRONSON, J. Navigable rivers belong to the public. Other streams may be owned by individuals. This doctrine is founded on principles of public policy, so obviously just and wise, that it is no matter of astonishment to find it prevailing all over Europe, and, so far as I know, all over the civilized world. Indeed it would be strange, if any enlightened people had failed to perceive the importance of declaring all navigable waters public property.

In England a rule of evidence has been adopted, which although it recognizes the doctrine, does not always give it complete practical effect. By the common law, the flow and reflow of the tide is the criterion for determining what rivers are public. This rule is open to the double objection, that it includes some streams which are not in fact navigable, and which consequently might well be the subject of individual ownership ; and it excludes other streams which are in fact navigable, and which in every well regulated state should belong to the public.

Although the ebb and flow of the tide furnishes an imperfect standard for determining what rivers are navigable, it nevertheless approximates the truth, and may answer very well in the island of Great Brittan, for which the rule was made. But such a standard is quite wide of the mark when applied to the great fresh

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water rivers of this continent ; and would never have been thought of here, if we had not found the rule ready made to our hands. Now, I think no doctrine better settled, than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself, to apply a rule founded on a particular reason, to a case, where that reason utterly fails. *Cessante ratigone legis, cessat ipsa lex.*

The doctrine of the common law in relation to the ownership of fresh rivers has never been distinctly acted upon in this state when the river was in fact navigable, except in a single instance, and the judgment rendered on that occasion has since been reversed for error. In *The People v. Platt*, 17 Johns. R. 195, the question did not arise ; for the case states, that the *Saranac* "is a rough, rapid, and shallow stream, with a rocky bed ;" and that "the river is *not* navigable for any kind of boats or craft." In *Hooker v. Cummings*, 20 Johns. R. 90, the question was again discussed, though it was not necessary to the decision of the cause, and it did not appear that *Salmon* river was in fact navigable. In *Ex parte Jennings*, 6 Cowen, 518, it did not appear that the *Chitteningo* creek was navigable ; but the contrary may fairly be inferred from the facts of the case. The common law rule was first applied to a fresh river which was in fact navigable, though only for boats, in *The Canal Commissioners v. The People*, 5 Wendell, 423, 13 Wendell, 355, and 17 Wendell, 571. But the judgments of this court asserting the doctrine have been twice reversed by the court for the correction of errors.

If it were either necessary or proper for me to vindicate the judgments of the court of last resort, it could I think, be most satisfactorily established that it is now and always has been the law of this state, that *navigable rivers*, whether fresh or salt, and without any reference to the flow and reflow of the tide,



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belong to the public. But it is enough that the question has been settled by a forum from which there is no appeal.

If we can judicially notice the fact that there is no tide in the Genesee river, see *Hooker v. Cummings*, 20 Johns. R. 98, I know not upon what principle we can say, without proof, that the stream is not in fact navigable. In truth it is navigable at and near its entrance into Lake Ontario; how it may be above the falls at Rochester, I am unable to say. It is probably a sufficient objection to this action that the plaintiffs seek to recover a part of the bed of a river without showing that it is such a stream as is subject to individual ownership. But as there may be a doubt as to where the *onus* lies of showing the character of the stream, I shall not rest my opinion on this point.

Assuming that the Genesee river is not navigable in any sense of the term, and also that we have adopted in its whole extent the common law rule in relation to the ownership of fresh rivers, I still think it quite clear that the plaintiffs are not entitled to recover. The common law, as I read it, has never said that a *grant* of lands bounded by the shore of a stream of any description, extends beyond the specified limit, and includes other lands not embraced by the terms of the grant. Lord Chief Justice *Hale*, in his celebrated treatise *de jure maris*, lays down no such doctrine, nor do I find that it has ever been judicially asserted in Great Britain. If the rule exist at all, it is one of modern invention, and had its origin on this side of the Atlantic. It is a refinement on the common law, which is in itself sufficiently absurd when transplanted and applied to the great inland waters of this country.

What is this case? *Nathaniel Rochester and others* were seised in fee of a tract containing 100 acres of land on the west side of Genesee river, including the bed of the river to the thread of the stream. How they acquired title, the case does not state, but their seisin is admitted. Under Rochester and others the plaintiffs made title by deed to a small portion of the property. The conveyance describes the premises granted by metes and bounds. The description, so far as it is material to the present

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inquiry, is as follows : thence eastwardly "*to the Genesee river ; thence northwardly, along the shore of said river, to Buffalo-street.*" Although, without explanation, there might be room for doubt as to the true terminating point of the line running *to the river*, that doubt is fully resolved by the words which immediately follow—"thence northwardly *along the shore of said river.*" And besides, instead of running to the *bridge*, as the line would if it followed the thread of the stream, it runs to the *street* which runs west from the bridge and bounds the premises on the north. The land enclosed by the lines given in the deed lies wholly on the west side, and does not include any portion of the river. I did not understand this to be denied on the argument. As a question of fact it is impossible to maintain, either that one party intended to grant, or that the other expected to acquire, any land lying beyond the specified boundary. There is nothing in the deed from which it can be justly inferred that the parties meant more than they said. Although the property conveyed is called a *mill-seat lot*, the water was to be taken from a race already constructed, and which ran near the west side of the lot. Without including any part of the bed of the river, the plaintiffs had got all the property which they purchased, and every thing necessary to its beneficial enjoyment in the way contemplated by the grant. How then have they acquired a title to the bed of the river, which is claimed in this action ? It is said they acquired it by virtue of the common law doctrine concerning the ownership of fresh rivers. That position, cannot I think, be maintained. Let us see how the question stands on authority.

The first branch of the doctrine, as laid down by *Hale* and others is, that while arms of the sea, or rivers in which the tide ebbs and flows, belong to the public, fresh rivers may be the subject of private property. If the bed of a stream may be owned by individuals, then, like other real estate, it may be bought and sold, granted and conveyed. The owner may alien all that he has, or a part only. He may sell the bed of the river either with or without other lands ; and he may sell adjacent lands either with

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or without the bed of the river. If a proposition so plain need the support of a great name, I refer to *Hale*. He says, "one man may have the river, and others the soil adjacent." *Harg. Law Tr.* 5.

Another branch of the doctrine is, that the owner of the adjacent soil is "*prima facie*," or "*in common presumption*," owner of the river. If he own on both sides, the whole of the river is included—if only on one side, his right extends *usque filum aquæ*. *Harg* p. 5, 6. The doctrine is not that the riparian proprietor must necessarily own the river, nor is there any rule of the common law which says that the stream will pass by a grant of the adjacent soil, either as an incident or otherwise. The law indulges a *presumption* in favor of the shore owner, which will prevail *in the absence of all proof to the contrary*. This, like most other presumptions, may be rebutted. The language of *Hale* is, "but special usage may alter that common presumption, for one man may have the river and others the soil adjacent." Now, if special usage, or prescription, which supposes a grant, will overcome the presumption, then most clearly the presumption may be rebutted by any evidence which disproves the fact of title in the shore owner. That evidence we have in this case. It was admitted on the trial that Rochester and others, under whom the plaintiffs make title, were formerly seised of a tract of land covering the premises in question." Until the contrary is shown, the presumption of law is, that the title still remains in the original proprietors. The plaintiffs show a conveyance, but it does not include the premises in question. They were limited by their grant, as well they might be, to the shore of the river. The *prima facie* presumption in their favor as riparian owners, is effectually disproved and overthrown by showing the title in another.

The learned *Charles Butler*, in his *note*, 205, to *Co. Litt.* after paying a just compliment to Lord *Hale*, proceeds to re-affirm his doctrine. After adverting to the language of *Hale*, that "fresh rivers of what kind soever, do of *common right* belong to the owners of the soil adjacent," he remarks, that "in all these cases

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the *presumption* is in favor of him to whom the right or property is said to belong by common right; yet this does not exclude the possibility of its belonging to another. *To another therefore it may belong*; but, if he claims it he must prove his title to it." He adds, that "*the intendment of the law*" is in favor of the "riparian owner, *till there is proof of the contrary.*" That proof was given in the case at bar. The same doctrine was recognized by Sir John Leach, V. C. in the recent case of *Wright v. Howard*, 1 Sim. & Stu. 190. He says, not that the shore owner is entitled to the river *at all events*, but "*prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the water of the stream."

In *Hatch v. Dwight*, 17 Mass. R. 289, the precise point was adjudged, that the grant of land bounded by the bank of a river will not pass the bed of the stream. Parker, Ch. J. said, "the land released is limited to the bank of the stream, which necessarily excludes the stream itself. And again—"the owner may sell the land [on the shore] without the privilege of the stream, *as he will do if he bounds his grant by the bank.*" This doctrine was admitted by the chancellor in *The Canal Appraisers v. The People*, 17 Wendell, 589, although he went further than a majority of the court in upholding the claims of the riparian owner. And Washington, J. has, I think, in *Dew v. Wright* 1, Peters' C. C. R. 64, shown most satisfactorily that the common law rule concerning the ownership of fresh rivers cannot aid the plaintiffs.

There is no ground for saying that the bed of the stream is appurtenant, or that it can pass as an incident of the grant. It is not an easement. It is land. The owner conveys a part of his property with a definite boundary, and the grantee claims the right to go beyond that boundary and take another piece of land, which is probably much larger than the one described in his deed. He does not claim by force of his grant, but by the common law. That noble fabrick of human wisdom, although it exhibits here and there a blemish, has never authorized so wide a departure from the maxims of reason and common sense. In

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*Jackson v. Hathaway*, 15 Johns. R. 447, Platt, J. says, "It would be absurd to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted, by precise and definite boundaries."

This court, unless in the case which has been reversed for error, has never laid down any principle which can aid the plaintiffs; but quite the contrary. The case of *Jackson v. Louw*, 12 Johns. R. 252, presented a simple question upon the construction of a deed. It had nothing to do with the common law presumption in relation to the ownership of fresh rivers. The courses given by the deed ran *to the creek*, thence *up the same*. The court said that "the terms 'up the same,' necessarily imply that it is to follow the creek according to its windings and turnings, and that must be in the middle or centre of it." But in the case at bar, the line after running *to the river*, does not run thence up or along *the same*, but "along *the shore* of the said river." No possible construction can carry this line to the centre of the stream, without doing violence to the contract of the parties. But this precise question was adjudged in *Jackson v. Hathaway*, before cited, which related to lands bounded by a highway. There, as well as in the case of fresh rivers, the law, in the absence of all evidence to the contrary, presumes that the owner of the adjacent soil owns also the highway—the whole of it, if his lands lie on both sides, or the half of the road, if he only own on one side. The case was a strong one for the defendant. He had purchased the land on both sides of a road, which sixteen years afterwards was discontinued; and yet the original proprietor recovered against him in ejectment. In that case, as in this, he claimed *by grant*; and the question was, what has one party granted and the other acquired? what is the true construction of the deed? There he was bounded by *the side* of the highway; here the party is bounded by *the shore* of a river. The language of the court is much to the present purpose. "There is nothing," says Platt, J. who delivered the opinion, "in the deeds for the lots bounded on *the sides* of the old road, which denotes any intention to buy or sell any land not expressly included within the

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courses and distances expressly defined, and it is conceded that those limits do not include the space occupied by the old road." Again, he says, "there are many cases of *loose, vague and general* description in deeds, which undoubtedly may require a different construction, and be subject to a different rule. Where a farm is bounded *along a highway, or upon a highway, or running to a highway*, there is reason to intend that the parties meant the middle of the highway; but, in this case, *the terms of the description necessarily exclude the highway.*" So in the case at bar, "the terms of the description necessarily exclude" the river. The judge adds, "It is impossible to protect the defendant, on the ground that the adjoining road passed by the deeds as an *incident* to the lands professedly granted. A mere *easement* may without express words, pass as an incident to the principal object of the grant; but it would be absurd to allow the fee of one *piece of land*, not mentioned in the deed, to pass as appurtenant to another *distinct parcel*, which is expressly granted by *precise and definite boundaries.*" I am not aware that this case has ever been questioned, and it is a most decisive authority against the plaintiffs.

In this case, if one party had intended to grant, or the other had expected to acquire one half the bed of the stream, I cannot doubt for a moment that the deed would have contained some such language as this: thence easterwardly to *the centre* of the Genesee river; thence northwardly along *the centre* of said river, &c. But if this can be questioned, we know beyond all room for a peradventure, that when the parties said "along *the shore*," they did not mean along *the centre* of the river. There is no principle of the common law which will authorize us to disregard the intention of the parties, and extend the grant beyond the boundary upon which they have agreed.

When once it is settled, whether here or in England, that rivers of any particular description are subjects of private property, it is then not unnatural to presume that he who owns the shore or bank, owns also the bed of the stream. Alienations were originally made without writing; and where they have

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been made by deed, it must often happen that the instrument cannot be produced for the purpose of establishing boundaries. The party makes title to his manor or lands, by showing that he and those under whom he claims have held time out of mind. But from the nature of the case, he must often fail in making out a prescriptive title to the bed of a stream flowing by or through his possessions. To remedy this difficulty, the law steps in and says, that in the absence of all proof to the contrary, it is but a reasonable presumption that he who owns the adjacent soil is the proprietor of the stream also. The presumption concludes no one. It only asserts what is probably true, and, like all other *prima facie* presumptions, it falls to the ground when the fact turns out to be otherwise. This is the whole length and breadth of the common law rule which the plaintiffs have called to their aid for the purpose of enlarging their grant, and spreading it over land not included within the specified limits.

The doctrine we have been considering has nothing to do with a grant or conveyance. It is not a rule for settling the true construction of a deed. When a party presents his charter, the law makes no presumption concerning his title: he holds by force of his grant; he goes to the limit which that prescribes, and by that limit he is bounded. If there is any thing equivocal in the language of the grant the courts declare its interpretation. But if, as in this case, the parties have used plain and explicit language—if they have fixed a boundary which no man can mistake—courts have nothing to say about it. The law makes no intendment. It simply declares that the parties must abide by their contract. It is, as I think, a total misapplication of the rule of common law concerning the ownership of fresh rivers, to say that it has any thing whatever to do with the construction of a deed, or by way of fixing the boundaries of a grant. The presumption in favor of the riparian owner is only indulged in the absence of any direct evidence of his boundary; it is never used for the purpose of enlarging, qualifying or in any way affecting his written muniments of title, or the limits which they prescribe.

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If there is no settled doctrine of the common law which can aid the plaintiffs, I think it quite clear that they must fail; for there is neither reason nor common sense in making the deed operate upon property which the one party did not contract to purchase, and the other party did not agree to sell. I think the defendants are entitled to judgment.

The majority of the court being, however, of a different opinion, judgment was rendered for the plaintiffs.

Judgment for plaintiffs.

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## HITCHCOCK vs. COVILL.

Where goods are obtained by a purchaser by making false representations as to his pecuniary condition and ability to pay, and by suppressing the truth in those respects, the vendor may rescind the sale, and after demand and refusal bring an action of trover against a sheriff who has levied upon the goods by virtue of an execution against the purchaser.

*It seems*, that where goods are ordered by the purchaser to be sent to a particular place, and the course of business at such place is for the *warehouseman* to keep them until called for or ordered on by the owner, the *transitus* is ended, and consequently the *right of stoppage* is terminated.

It is no answer to the action that the claim was originally placed upon the right of *stoppage in transitu*, if subsequently and before the sale a *general demand* was made; and especially where the sheriff took an indemnity.

THIS was an action of *trover*, tried at the Chemung circuit, in June, 1837, before the Hon. ROBERT MONELL, one of the circuit judges.

The suit was brought for a quantity of merchandize sold by the plaintiff, a merchant in the city of New-York, to one *Hobart B. Graves*, which was forwarded from the city of New-York to *Havanna*, a village at the head of the Seneca Lake, in pursuance of the direction of Graves. On the arrival of the goods at *Havanna*, they were levied upon by a deputy of the defendant, who at the time was sheriff of the county of Tioga, by virtue of an execution issued on a judgment in favor of I. Trotter and J.



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Hitchcock v. Covill.

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B. Douglass against Graves, by the name of *Hobart Graves, junior*, and against two other persons. This judgment had been assigned to one *S. H. Addington*, under whose direction the levy was made. On being informed of the seizure of the goods, the plaintiff caused a written notice to be given to the sheriff that the goods had been sold by him to Graves, that the price remained unpaid, and that he claimed the right of *stoppage in transitu*, in consequence of the insolvency of Graves. Subsequently, and previous to the sale by the sheriff, a new demand was made by the plaintiff without specifying any grounds of claim; to which the sheriff answered that *if he was indemnified* to his satisfaction he would sell, and on receiving such indemnity he proceeded and sold. On the trial of the cause the plaintiff proved that in October, 1831, Graves, who then resided at *Willardsburgh*, in the county of *Tioga*, in the state of *Pennsylvania*, came to New-York to purchase goods, and made purchases of the plaintiff, and other merchants in the neighborhood of the plaintiff, to the amount of about \$700. He then represented his name to be *Hobart B. Graves*, that he had purchased of a Mr. Willard, at *Willardsburgh*, a stock of goods amounting to \$2,500, had paid on account of that purchase \$1,200, leaving a balance of \$1,300, due, *which was all he owed in the world*; and that he wanted a small stock of goods to replenish his store. In April, 1832, he came again to New-York, and represented that he had made a further payment of \$400 to Mr. Willard, leaving a balance due him of \$900, *which was all he owed*, except for his fall purchases, the whole of which he intended to pay except \$150. Upon these representations the plaintiff sold him a further quantity of goods amounting to \$394.30, on a credit of six months, and four other houses acting upon the same representations, sold him goods to the amount of \$2,000. Graves paid and made arrangements to pay his purchases of the preceding fall, to within \$150, as he had promised to do. He directed the goods purchased of the plaintiff to be shipped on board a lake or canal boat bound to the village of Havanna, and they were accordingly boxed, directed to him at *Willardsburg, Tioga Co., Penn.*, and put on board a canal boat on the 12th May. The goods

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Hitchcock v. Cevill.

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arrived at Havana on the 24th May, and were deposited in a warehouse of a Mr. Waterhouse, where they were immediately levied upon by the defendant's deputy. *Havana* was at that time at the head of navigation, and the course of business was to deposit there goods brought by canal and lake boats, there being no forwarding line beyond that point, and the warehouse-man kept them until called for or ordered on by the owners. The distance from *Havana* to *Willardsburgh* is between 30 and 40 miles. On 28th May, Graves came to Havana for his goods, having with him a team and driver, but finding them levied upon, did not take them. The judgment and execution were given in evidence; the execution directed a levy of the sum of \$1,468.91, with interest from 1st December, 1824, besides costs of suit, &c. The proceeds of the sale amounted to upwards of \$1,600, which sum was paid to and receipted by *Addington*. Graves formerly resided in the neighborhood of *Addington*, in Oneida county, in this state, and was there known by the name of *Hobart Graves, junior*; at *Willardsburgh* he was known by the name of *Hobart B. Graves*. His insolvency was proved.

The counsel for the defendant objected to the evidence of *fraud* on the part of Graves in obtaining the goods, insisting that the plaintiff having in the notice to the sheriff placed his claim upon the right of *stoppage in transitu*, was precluded from assuming any other ground of recovery; but the objection was overruled. He also insisted that the goods having arrived at *Havana*, the delivery was complete, and that the right of *stoppage in transitu* was ended; and further, that there was not such evidence of fraud as would vitiate the sale. The judge charged the jury, that he inclined to the opinion that the right of *stoppage in transitu* was not terminated by the delivery of the goods at *Havana*, that not being the place of their ultimate destination, but did not think it necessary to place the decision of the case upon that ground. That the plaintiff had a right to insist upon the fraud in the misrepresentations alleged to have been made by Graves; and if they should find that he had made false representations as

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Hitchcock v. Covill.

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to his true name, and as to his pecuniary circumstances, and thereby had induced the plaintiff to part with his goods, the plaintiff upon that ground alone would be entitled to reclaim his goods, although Graves might have intended at the time, ultimately to have paid for the goods, and did not purchase them with a view of exposing them to the execution under which they were taken. The jury found a verdict for the plaintiff for \$530.76 damages. The defendant asked for a new trial.

*S. Stevens*, for the defendant.

*J. A. Collier*, for the plaintiff.

*By the Court*, NELSON, Ch. J. I am inclined to the opinion that the *transitus* was at an end. The course of trade as well as the instructions given, pointed out *Havanna* as the place where the goods were to be deposited, and wait for the special charge and directions of the vendee; there was no forwarding line beyond it, and the usage was universal by the warehouse-man thus to detain them; after this, the vendee necessarily took special charge of any further conveyance, and it may be said that the goods were carried from thence by his own teams. But even if any doubt should exist as to the soundness of this view, and I admit that the cases are scarcely reconcilable upon the point, *Hunter v. Beale*, 3 T. R. 466; *Stokes v. La Riviere*, 3 East, 397; 2 Bos & Pull. 461; 7 T. R. 440; 5 East, 175; 2 Selw. 982; *Ross on Vend.* 221, 243; 15 Wendell, 137; 17 *id.* 504; when we take in connection with the other circumstances the additional fact that Graves called with his teams and would have taken the goods into his actual possession, had it not been for the levy, it seems to me there can be no longer any doubt. 4 Esp. 82. 2 Bos & Pull. 461. 3 T. R. 464. *Ross*, 239. But admitting that the above conclusion may be erroneous, the plaintiff, I think, is still entitled to retain the verdict upon the other ground taken at the trial. The jury have found under proper instructions, that the goods were purchased upon a credit by means of the false representations of Graves in respect to his pecuniary condi-

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Hitchcock v. Covill.

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tion and ability to pay, and that after special inquiries of him upon the subject. It is obvious from the facts in the case, that instead of being in the prosperous condition represented, he suppressed the truth, and was hopelessly bankrupt. The change of his name at the time he removed to *Pennsylvania*, also cast suspicion over his character, and went to shew that his fraud was premeditated.

But it is urged that the written notice and demand first made, that the goods were claimed upon the special ground of *stoppage in transitu*, precluded the plaintiff from setting up any other, as on the trial it would operate as a surprise upon the officer. It is, I think, a sufficient answer to say, that a general demand was subsequently made before sale, which was enough to put the defendant upon inquiry as to the nature of the plaintiff's claim, and leaves the plaintiff unembarrassed as to the ground upon which he chooses to rest. I know it was said in reply that the officer might have inferred that the claim was still on the first ground, no other being specified; but this inference necessarily requires us to assume the second demand to have been an idle ceremony, which we cannot do, as it would be a very forced conclusion. Besides, as regards the officer, it is apparent that he could not have been mislead or surprised by the plaintiff enlarging the ground of the claim, as he has taken the precaution to be indemnified, and put his refusal on that footing. And in respect to the party in interest, I do not perceive any good reason for conceding to him the benefit of the objection, as he stands in no better situation than *Graves*, who clearly could not have availed himself of it. He would not be permitted upon this pretence to shut out his own fraud under the circumstances of the case. The instructions in pursuance of which the first claim was made were dictated by counsel in the city, before the true history of the case was known, and the second was made by advice of other counsel after Wood (the clerk,) had visited *Willardsburgh*, and learned the particulars.

New trial denied.

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*Cable v. Dakin.*

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**CABLE, FITCH & LOSSE vs. DAKIN & DAKIN.**

An inquiry assessing the damages of a defendant in an *action of replevin* after a discontinuance of the suit, will not be set aside on the ground of the *excessiveness of the damages*, where the proceeding on the part of the plaintiff is venacious and oppressive, and no rule of law has been violated by the jury. A jury in such case are authorized to give smart money.

Motion by plaintiffs to set aside inquiry on the ground that the damages are excessive.

On *24th September*, 1834, the plaintiffs replevied three boat loads of lumber which the defendants had at Albany, and were about forwarding to Boston for sale. The defendants had several other boat loads of lumber, a part of which they were about selling in Albany to raise money to pay off a mortgage to *Cable*, of which *Fitch & Losse* had the control. On the executing of the writ of replevin, the defendants put in a claim of property, which was tried the next day, when the jury found property in the defendants. The same evening the boats, in the charge of the defendants' servants, went to Van Wie's Point, the place where vessels were loaded for Boston. The plaintiffs requested time until the next day to consider whether they would give a further bond pursuant to the statute, and proceed with the suit, which the defendants granted. The plaintiffs were advised on the same day not to proceed with the suit, but notice of this advice was not given to the defendants, who waited until Monday morning the *29th September*, when they sent to the sheriff's office and ascertained that a further bond had not been given. In February, 1835, the defendants obtained judgment of discontinuance, and on the *30th May*, the writ of inquiry of damages, pursuant to the statute, was executed. The jury found the value of the property replevied to be \$5,000, and they assessed the defendants' damages at \$750. In the affidavits on which this motion is founded, is set forth a mortgage under which the plaintiffs allege the writ of replevin was sued out.

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*Cable v. Dakin.*

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*A. Tuber*, for the plaintiffs.

*R. W. Peckham*, for the defendants.

*By the Court, BRANSON, J.* On examination of the affidavits on both sides, there can be but little doubt that the defendants actually sustained as much damage in consequence of the interference of *Loose* on behalf of the plaintiffs, and the replevin, as the jury has given. They suffered in the payment of expenses, the price of transportation, and the fall in value of the lumber before it could be forwarded to the Boston market. It is a fatal objection to this motion, that it no where appears that the mortgage was in evidence before the jury. Without proof of the mortgage, there was not the slightest color for the replevin suit; it was a most vexatious and unwarrantable proceeding, and the jury would be well warranted in giving heavy damages—they might allow smart money.

But if the mortgage had been given in evidence, there was no proof going to show that *Fitch & Loose* acted in good faith in taking the property under it, and there was evidence from which the jury might find that they were influenced by unworthy motives, such as the law will not tolerate. I do not think it necessary to state the evidence although I have examined it with care. I should have been as well, if not better satisfied, had the jury given less damages. But it is impossible to say that any rule of law has been violated, and this is a case where we cannot disturb the verdict of the jury without interfering with settled principles. 15 *Wendell*, 368. 15 *Johns. R.* 493.

Motion denied.

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 Wheadon v. Olds.
 

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 WHEADON vs. OLDS.
 this hadnote  
is very inaccurate

Where a contract is made upon an assumed state of facts in reference to which there is a *mutual mistake*, money paid under such contract may be recovered back, *pro tanto*, in an action of *assumpsit*; and it was accordingly held in this case, where a contract was made for the sale and delivery of oats, and the parties upon a mistaken state of facts, estimated the quantity at a certain number of bushels, for which the stipulated price was paid, that the purchaser was entitled to recover back money paid for the *difference* between the estimated and real quantity; and that, notwithstanding he had agreed to take the oats at the estimated quantity, *Me or miss.*

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THIS was an action of *assumpsit*, tried at the Onondaga circuit in March, 1836, before the Hon. DANIEL MOSELEY, one of the circuit judges.

The defendant agreed to sell to the plaintiff from sixteen to twenty hundred bushels of oats, at forty-nine cents per bushel. The delivery of the oats was commenced by removing them from a store-house to a canal boat; tallies were kept, and when the tallies amounted to 500, it was proposed to guess at the remainder; and after a while it was agreed between the parties to call the whole quantity 1,900 bushels, and the plaintiff accordingly paid for that quantity at the stipulated price. When the oats came to be measured it was ascertained that there were only 1,488 bushels delivered. It was then found that the *mistake* had happened by both parties assuming as the basis of the negotiation, fixing the quantity of 1,900 bushels, that 500 bushels had been loaded in the boat at the time when they undertook to guess at the residue, whereas in fact only 250 bushels had been loaded—the tallies representing *half bushels* and not *bushels*, and that the parties supposed that the quantity loaded was not a *quarter* of the whole quantity. The vendor refusing to refund a portion of the money received by him, this action was brought by the purchaser, who declared for money had and received, and delivered a *bill of particulars* stating the contract between the parties that the oats were delivered, and “that in *measuring* said oats “a mistake was made, whereby the plaintiff paid the defendant

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Whendon v. Olds.

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"for about 300 bushels more oats than he received." The defendant proved by one witness that the plaintiff said he would take the oats at 1,900 bushels, *hit or miss*, and by another that he had acknowledged that he took the oats at that quantity *at his own risk*. He further proved that before the boat left the store-house, on dissatisfaction being expressed by a friend of the plaintiff who was to advance the money for him, as to the mode of ascertaining the quantity, that he told them that if they were dissatisfied with the quantity, to put the oats back into the store-house, and pay him for his trouble. When the evidence was closed the counsel for the defendant stated that he should not question the fact that the parties *were mutually in error* in supposing that 500 bushels of oats had been put on board when in fact only 250 bushels had been put on board at the time of the bargain in reference to the quantity, but insisted that the bargain was obligatory upon the plaintiff, and that therefore he was not entitled to recover. He also insisted that the proof varied from the bill of particulars; and thirdly, that at all events the plaintiff was only entitled to recover for the deficiency of 250 bushels in the first estimated quantity. The judge charged the jury that if they should find that the parties at the time of the bargain in reference to the 1,900 bushels were in error as to the quantity measured, and supposed that 500 bushels had been measured when in fact the quantity measured was only 250 bushels, and had based the bargain upon that supposition, then that the plaintiff was entitled to recover for the *deficiency* of the 1,900 bushels. The jury found a verdict for the plaintiff for \$190. The defendant moves for a new trial.

*S. Stevens*, for the defendant.

*J. L. Wendell*, for the plaintiff.

*By the Court*, COWEN, J. The objection at variance from the bill of particulars was too general. It should have been stated whether it was in quantity, or sum, or in what else.

The mistake as proved went not only to the quantity measured, but the jury found, under the charge of the judge, that



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Wheaton v. Olds.

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relatively it influenced the entire agreement to take the oats at 1,900 bushels. One ingredient of estimating the residue, as talked of, was the assuming that the supposed 500 bushels was one-fourth of the pile, which would operate unfavorably to the plaintiff, if he reasoned from the size of the smaller to that of the larger pile. Here was an admitted error, which certainly influenced the conduct of the plaintiff to the extent of 250 bushels; and, as we must take it on the finding of the jury, to the full amount which the oats came short of the 1,900 bushels. All the excess of payment arose from a count of *half bushels as bushels*. And the only question in the least open is, whether an agreement, based on that mistake, to accept the oats at the plaintiff's own risk of the quantity, shall conclude him. The mistake which entitles to this action, is thus stated by the late Chief Justice Savage from the civil law: "An error of fact takes place, either when some fact which really exists is unknown, or *some fact is supposed to exist which really does not exist.*" *Mowatt v. Wright*, 1 *Wendell*, 360. He cites the words of 2 *Ev. Poth.* 437. And see 1 *Dom.* 248, *B.* 1, *tit.* 18, § 1, *pl.* 1. In judging of its legal effect, we must look "to the regard which the contractors have had to the fact which appeared to them to be true." 1 *Dom.* 250, *B.* 1, *tit.* 18, § 1, *pl.* 11. And when we see that the agreement is the result of such a regard, or, as the judge said to the jury, is based upon it, I am not aware of any case or dictum, that, because part of the agreement is *to take at the party's own risk*, or as the parties expressed it here, hit or miss, it therefore forms an exception to the general rule. The agreement to risk was, *pro tanto*, annulled by the error. The money was paid under a contract void for so much as the oats fell short of 1,900 bushels. The effect would have been very different, had the truth been known to the plaintiff. See *Domat as before cited*. The foundation of the arrangement to take at the plaintiff's risk, was a misreckoning, one number being put instead of another, "which," says *Domat pl.* 12, "is a kind of error in fact different from all other errors, in that it is always repaired."

The motion for a new trial is denied.

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CROCKE v. SLACK.

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## CROCKE &amp; FOWKE vs. SLACK and others.

A steamboat may be proceeded against by attachment for a debt contracted by the master, &c. for wood furnished the boat to supply her furnaces. The language of the Revised Statutes is broader than that of the act of 1798, under which it was held that a debt contracted for wood was not a lien.

PROCEEDINGS against ships and vessels. This was a motion to set aside the report of a referee, to whom had been referred the claim of the plaintiffs in an action on a bond executed by the defendants, to obtain the discharge of a steamboat from an attachment issued against her. The only question in the case was whether a debt contracted for wood, furnished a steamboat to supply her furnaces, was a *lien* within the act authorizing proceedings against ships and vessels by attachment. The referee decided that it was within the act, and accordingly allowed the plaintiffs' claim.

*M. T. Reynolds*, for the defendants.

*S. Stevens*, for the plaintiffs.

*By the Court, NELSON, Ch. J.* I am inclined to think that wood or coal furnished a steamboat for her usual trips should be construed as coming within the terms of the statute giving a *lien* and summary remedy, for the collection of the debt created thereby against ships and vessels, 2 R. S. 493, § 1. The terms of the act are, whenever a debt shall be contracted "for such provisions and stores, furnished within this state, as may be fit and proper for the use of such vessel," &c. The word *provisions*, strictly considered, would be confined to such articles as enter into the food or subsistence for hands and passengers; but *stores* is a more general term, and may fairly embrace the article in question.

In *Johnson v. The Steamboat Sandusky*, 5 Wendell, 510, the court would, I think, have embraced wood within the term

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 Carr v. Ellison.
 

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*supplies*, used in the act of 1798, 1 R. L. 130, had it not been for the connection which seemed to confine it to such articles as enter into the construction or equipment, and became a part of the vessel itself. To avoid this difficulty the language has been varied and transposed in the Revised Statutes, and this case is therefore taken out of the authority of that above cited.

Motion denied.

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 Carr and others vs. Ellison.
 

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*A covenant to renew a lease under the same covenants contained in the original lease, is satisfied by a renewal of the lease omitting the covenant to renew.*

ERROR from the New-York C. P. This was an action of ejectment to recover possession of a house and lot of land in the city of New-York. On the trial, the plaintiff made out a title in fee to the premises, derived from *Thomas Ellison*. The defendants claimed under *William Corwin*. *Thomas Ellison* being seised in fee of the lot of land in question, demised the same to *Corwin* for the term of 21 years, from the first day of May, 1793, at a certain yearly rent. By the lease, *Corwin* covenanted that on or before the first day of November, 1793, he would at his own proper cost and charges, erect and finish on the land a two story frame house, and at the end of the term would yield and surrender up the same to *Ellison*. It was agreed that such buildings as *Corwin* should erect on the lot should, at the end of the term, be appraised by indifferent persons, to be chosen by the parties; and *Ellison* covenanted that he would pay *Corwin* the appraised value, "or he, the said *Thomas Ellison*, his heirs or assigns, shall renew the lease unto the said *William Corwin*, his executors, administrators or assigns, for the term of twenty-one years more, for and under the same yearly rents, and under the same covenants as is herein before granted." *Corwin*, and afterwards the defendants under him, entered and held the premises

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Carr v. Ellison.

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under the lease, and paid the stipulated rent down to the first day of May, 1835, the end of the second term of 21 years, but it did not appear that the lease was in fact *renewed*, at the end of the first term in 1814. The defendants insisted that the lease had in effect been renewed in 1814, by the act of the parties, with the same covenants as those contained in the original lease: and in April, 1835, they called on the plaintiff to appoint an appraiser, and to pay the value of the buildings which the lessee had erected on the lot, or to renew the lease *for another term of 21 years with the like covenants* as those contained in the original lease. The plaintiff refused to do either, and after the expiration of the second term of 21 years, in May, 1835, brought this action to recover possession of the property. On this case the court below charged the jury that the plaintiff was entitled to recover; the defendants excepted to the opinion, and judgment having been entered against them, they now bring error.

*A. Taber*, for plaintiffs in error.

*M. T. Reynolds*, for defendant in error.

*By the Court*, BRONSON, J. On the construction for which the plaintiffs in error contend, the lessor covenanted in case the value of the buildings was not paid, for a perpetual renewal of the lease: in other words, he agreed to renew the covenant for a renewal, as well as the other covenants contained in the lease. The courts lean against such a construction of the contract as will lead to a perpetuity, and will not infer an agreement for a second renewal from a general provision for a renewal of the lease with similar covenants. *Rogers v. Hunter*, 6 John. Ch. R. 215. *Piggot v. Mason*, 1 Paige, 412. *Tritton v. Foote*, 2 Bro. Ch. 636, and note (a) by W. Eden, p. 639. The parties did not, I think, contemplate more than two terms of 21 years. If the stipulation for "the same covenants" in the new lease, include the covenant for a renewal, it included also the covenant on the part of the lessee that he would erect a house on the land on or before the first day of November, 1793—a thing which

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Carr v. Ellison.

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was impossible in 1814, when the first term expired. Or, if we reject that part of the stipulation which relates to time, the covenant to build will still remain, and then the contract was that the lessee should erect a new house on the demised premises as often as he should obtain a renewal of the lease. It is difficult to suppose that this was the intention of the parties. The good sense of the contract seems to be this : the lessee agreed to erect a frame house on the premises, and the lessor stipulated to pay him the value of the building at the end of the term, or to compensate him by a renewal of the lease "for the term of twenty-one years more." After the lapse of a second period of twenty-one years, a wooden building could be of no great value, and the parties neither stipulated for pay, nor for a further renewal of the lease.

Although the lease was not in fact renewed at the end of the original term, the lessee and those claiming under him, had held the property for a second term of twenty-one years before this action was brought, and they have no longer any right to the possession either at law or in equity.

Should it be conceded that the defendants were entitled to a renewal of the lease in 1835, their remedy would either be in a court of equity for a specific performance of the contract, or by an action at law to recover damages for a breach of the covenant. The legal title is in the plaintiff, and nothing can be better settled than that in the action of ejectment, the legal will prevail over an equitable title.

It is not necessary to inquire whether the defendants were entitled to notice to quit, as no such question was made on the trial.

Judgment affirmed.

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Hubbell v. Denison.

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## HUBBELL vs. DENISON &amp; BUCKLEY.

An *attachment* does not lie against a vessel, under the statute authorizing summary proceedings against ships and vessels, at the suit of a sub-contractor for work done and materials found at the request of the builder of the vessel. An attachment lies only when the debt is contracted by the owner, agent, master, or consignee of the vessel; the builder is neither.

PROCEEDINGS against ships and vessels. *Aaron Hubbell* the plaintiff in this cause, sued out an attachment against the schooner *Columbus*: The defendants gave bond to obtain the discharge of the vessel when the plaintiff commenced a suit against them, and declared that on &c., at &c., he had a debt of \$138.50 due to him, contracted by *Stephen A. Hubbell*, the master-builder, owner, and contractor for building a certain schooner or vessel called the *Columbus*, for the work and labor of himself and servants done and performed upon the schooner, and for materials found at the request of the said *Stephen A. Hubbell*. The plaintiff then set forth the issuing of a warrant, the seizure of the vessel by virtue thereof, and the giving of the bond by the defendants, and alleges non-payment of his claim, &c. The defendants pleaded, 1. *Nil debet*; 2 *Unskillfulness* and *negligence* in performance of the work done by the plaintiff; and 3. That the plaintiff's debt was not a *subsisting lien*. Issue having been joined, the cause was sent to referees. The plaintiff proved that he caulked the vessel, and that the work was worth about \$130, and that he was employed by *Stephen A. Hubbell*, who it appeared had no interest or concern in the vessel other than as builder. On this ground the defendants moved for (what in the report is called) a *nonsuit*, which was refused by the referees, for the reason assigned by them, that the builder for the time being was the master of the vessel, and that the work having been done, and materials found at his request, the *lien attached*. The defendants proved that the work had been negligently done, and gave evidence of damages sustained by them; and the refer-

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Hubbell v. Denison.

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ees after making a deduction for the bad workmanship, reported in favor of the plaintiff to the amount of \$76.03. The defendants move to set aside the report.

*J. Clarke*, for the defendants.

*R. Lansing & G. C. Sherman*, for the plaintiff.

*By the Court*, COWEN, J. The report is well enough provided there was a lien. The statute upon which the action was brought, gives this remedy only in case of *lien*, and declares when that shall attach. It is thus: "Whenever a debt amounting to fifty dollars or upwards, shall be contracted by the *master, owner, agent* or *consignee* of any ship or vessel within this state, for either of the following purposes: 1. On account of any work done, or materials or articles furnished in this state, for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel. 2. For such provisions, &c. as may be fit, &c. 3. On account of the wharfage, &c. such debt shall be a *lien* on such ship or vessel, her tackle, &c., and shall be preferred to all other liens thereon, except mariner's wages."

The declaration avers that the debt was contracted by *S. A. Hubbell, the master, builder, owner, and contractor for building the vessel*. The proof is, that he was *not owner*; for he had assigned all his interest, and stood in the simple relation of a man hired to build. On its being objected that the debt was not contracted by either the *owner, agent, master* or *consignee*, within the statute, the referees overruled the objection, and proceeded on the ground that the labor was done and materials found, under the direction or by the consent of *the builder, who, for the time being, was the master*.

Clearly he was not *agent*; for he had no power to bind the owners, but only himself personally. He is still farther removed from the character of *consignee*, which neither the declaration nor proof sought to fix upon him. Was he the *master of the vessel* within the sense of the statute? What is a *master*? "He is," says Hobart, C. J. "the person entrusted with the ship and voyage;" and may as such implicitly raise certain liens upon

## Hubbell v. Denison.

the ship. He may even impawn the ship in case of extremities, for money to relieve against her distress, as the want of repairs, victuals, &c. *Bridgeman's case*, *Hob.* 11, 12. *Moor*, 918, *S. C.* He is not only one, says Molly, who for his knowledge in *navigation*, fidelity and discretion, hath the government of the ship committed to his care and management; but the law looks upon him as an officer, who must render and give an account of the whole charge, &c. *Mol. De Jur. Mar. B. II. ch. 2, § 1.* "Few individuals," says Jacobsen, "in any relation, have so extended a *mandatum præsumptum* conferred upon them, as ship-masters." *Jacobs. Sea Laws, B. I. ch. 1, p. 82, of Balt. ed. of 1818.* And maritime law permits the owner to dismiss the master at any time, even if he is part owner. The agreement between the owner and master is, that the latter will faithfully discharge every duty incumbent on him, render a satisfactory account, &c. and that he shall be secured in all his advances that do not exceed the value of the vessel, &c. *Id. p. 87.* "The master of the vessel," says Roccus, "is he to whom the care of the vessel is entirely confided. To his charge and direction the whole of the ship and every thing that belongs to her, and the mariners, are committed." *Ing. Roc. 17, note 3.* Thus the business of the master, as it has always been understood both by the civil and common law, is to command the ship on her voyage, under an appointment from the owners, in the discharge of which duty he possesses an extensive implied power as agent to bind the owners, himself being bound to the strictest responsibility. The statute might well allow such an officer to incur liens, without intending that a like authority should be vested in a mere master-builder. There is no analogy in their powers. The builder in the case at bar, did not possess even the narrowest agency, express or implied, to bind the owners. He was but a contractor, the plaintiff being one of his hands, who is confined to a remedy against his employer, personally. The builder is neither within the words, nor the reason, nor equity of the act.

The report of the referees must therefore, be set aside.



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 Smith v. Weed.
 

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## SMITH vs. WEED.

The release of a *lien* obtained by the suing out of an attachment, is a good consideration for the promise of a third person to pay the debt of the party proceeded against by such process.

The powers of a justice to issue an attachment as conferred by the Revised Statutes, are not abridged by the act to abolish imprisonment; on the contrary, they are enlarged and extended to new cases, differing however from the Revised Statutes as to the amount of indebtedness. The only operation of the act of 1831 on the Revised Statutes, is to dispense with the affidavit of witnesses as to the preliminary proof, and to declare the affidavit of the plaintiff sufficient to authorize the issuing of the process.

This was an action of *assumpsit*, tried at the Herkimer circuit in May, 1837, before the Hon. JOHN WILLARD, one of the circuit judges.

The plaintiff having sued out an *attachment*, issued by a justice of the peace of the county of Montgomery, against the goods and chattels of one John S. Joslin, by virtue of which a *levy* was made upon a quantity of *quarried stone* as the property of Joslin, the defendant promised that if the stone was the property of Joslin, and the plaintiff would discharge his *lien* upon the same and discontinue further proceedings upon the attachment, he would pay the *debt* due to him from Joslin. The amount of Joslin's indebtedness to the plaintiff, was \$131, and the stone was proved to be his property. The plaintiff alleged on the declaration, that the attachment was sued out under the statute entitled "Of courts held by justices of the peace." 2 R. S. 224. The justice who issued the attachment testified that the *application* for the process, the *affidavit* of the applicant, and the *attachment* were lost, but that the process was issued upon the *affidavit* of the plaintiff alone, and the ground of the application was, that Joslin had *departed from the county* where he last resided, *with intent to defraud his creditors*. He further stated that a bond was given with approved sureties, and produced the same, which was in the form prescribed by the Revised Statutes. A copy of the attachment tested on the *tenth*, and returnable on the *nineteenth* day of August, 1835, was read in evidence. The defend-

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ant moved for a *non-suit* on the ground of variance between the declaration and proof: that in the declaration, it was alleged that the attachment was issued under the provisions of the *Revised Statutes*, whereas the proof showed that the process was issued partly under the *Revised Statutes*, and partly under the *act to abolish imprisonment. Statutes, Sess. of 1831, p. 403, § 33, 34.* He also insisted that the attachment was *void*, because, 1st. It could not legally issue for a demand exceeding \$50; and 2d. The defendant in the attachment being a *non-resident* of Montgomery, not more than *four* days should have intervened between the teste and return of the process; and that the attachment being void, the promise of the defendant was without consideration, and for that cause, the plaintiff was not entitled to recover. The judge overruled the motion for a non-suit, and charged the jury that the plaintiff was entitled to their verdict for the amount of his debt against Joslin. The jury found accordingly, and the defendant now moves to set aside the verdict.

C. Tracy, for the defendant.

J. A. Spencer, for the plaintiff.

*By the Court, NELSON, Ch. J.* The attachment appears to have been regularly issued under the provisions of 2 R. S. 230 § 26, *et seq.* as amended in respect to the preliminary proof by the act of 1831, to abolish imprisonment for debt, *Statutes, Sess. of 1831, p. 404, § 35*, for a sum not exceeding \$100, upon the ground that the defendant in that process (Joslin) had absconded from the county with the intent to defraud his creditors. The authority given to a justice by the *Revised Statutes* to issue an attachment, was not abridged by the 34th section of the act of 1831, but on the contrary was extended to other cases, viz. the fraudulent *removal, assignment or secretion* of property, limiting however, the amount in those cases to *fifty dollars*. The *Revised Statutes* are left untouched except in respect to the affidavit of the facts and circumstances on which the application is made,

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which by the 35th section may now be made by the plaintiff himself, instead of being made by two disinterested witnesses.

The judge was clearly right in ruling that the stone attached belonged to *Joslin*, the defendant in the process; that the lien was valid, and that the release thereof constituted a good consideration for the undertaking of the defendant to pay the debt due to the plaintiff. 5 *Tunst.* 450. 2 *East*, 332. 4 *Tunst.* 117. 2 *Saund. on Pl. & Ev.* 547. Whether the agreement was intended to embrace the whole demand due, \$131, or only \$100, the extent of the lien, is matter of construction. The judge at the circuit took the former view of it from the language used by the witnesses, and I am inclined to think he was correct. The testimony of one of the witnesses is, that the defendant promised to pay the *debt of Joslin*, if the plaintiff would release the attachment; this may fairly include the whole, as the amount of the debt must have been well known at the time.

New trial denied.

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THE PEOPLE, *ex rel.* Michael Edick, *vs.* OSBORN and others,  
Judges of Herkimer C. P.

On an appeal to county judges from the determination of commissioners of highways relative to the laying out of roads, the commissioners must have notice in writing of the time and place of the meeting of the judges; the attendance of a majority of the commissioners, it seems, would be a waiver of notice, but the attendance of one commissioner only will not have that effect.

So, notice must be given to the occupant of the land through which the road is contemplated; and his attendance as a witness before the judges will not be deemed a waiver of notice.

CERTIORARI to remove the proceedings of judges in laying out a highway in the town of German Flatts, Herkimer county. The commissioners, on application, refused to lay out the road; *Jacob Bartlett* and others appealed to the judges, who reversed the determination of the commissioners, and made an order laying out the road through the land of *Michael Edick* and others. The return states that the judges met on the 24th October, 1834,

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viewed the route of the road, and *mado an order in writing* that the proceedings of the commissioners be reversed, and that the road be laid out pursuant to the prayer of the petition; that before proceeding to lay out the road, they adjourned to the 1st of November, for the purpose of hearing objections by the owners of the land through which the road passed. On the 1st of November, they met and *surveyed* the road; the heirs of *Joshua Randall* made objections, and the judges adjourned to the 10th of November. They met on the 10th, heard the parties, and on the 13th November made their final order. No notice in writing was given to the commissioners of highways, nor to the occupants of the lands. But one of the commissioners met with the judges, and the return states that the judges on the 1st of November went to the house of the son of *Michael Edick*, and informed him of the time and place of meeting. Whether this was for the meeting on the 1st or the 10th of November, does not appear; but on the 10th of November *Edick* appeared and was sworn as a witness.

*J. A. Spencer*, for the people.

*M. T. Reynolds*, contra.

*By the court*, *Brownson, J.* The judges had no jurisdiction to proceed on the appeal, until a notice of eight days of the time and place of meeting had been served on the commissioners. 1 R. S. 518, § 87, 88. The notice should be in writing. *Gilbert v. Columbia Turnpike Co.*, 1 Johns. Cas. 107. Although the notice need only be delivered to one of the commissioners, it is a notice to all; and the one who receives it should give information to the other commissioners. Had all or a majority of the commissioners met with the judges, it would, perhaps, be a sufficient answer to the objection; but it is not enough that one of the commissioners was present. It cannot be inferred from that fact that all of the commissioners were advised of the proceeding, even if a notice by parol was sufficient. If the commis-

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sioners can waive such a notice as the statute requires, there has in this case been no such waiver by a majority of those officers.

A notice in writing of three days to the occupant of the land through which the road is to run, was also necessary before the judges could proceed to lay out the highway. 1 R. S. 519, § 91, and p. 514, § 62. Edick had no personal notice, either verbal or written. The information given to his son was of no importance. And besides, it is impossible from the return to say whether that was a notice for the meeting of the judges on the day the notice was given, or for their subsequent meeting on the 10th of November. The fact that Edick was sworn as a witness on the 10th of November does not establish a waiver of legal notice. So far as appears, he came there in obedience to process of *subpoena*, (§ 89,) without having had an opportunity of preparing to enforce his objections to the road. It seems, also, from the return, that the judges decided the whole merits of the controversy at their first meeting on the 24th of October, before Edick had ever heard of the appeal. They viewed the route of the road, and made an order in writing that the proceedings of the commissioners be reversed, and that the road be laid out pursuant to the prayer of the petition. Their subsequent meetings seem only to have been held for the purpose of making a *survey* or an actual location of the highway, and not for the purpose of deciding the main question involved in the appeal.

Proceedings reversed.

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Wilson v. Green.

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**WILSON vs. GREEN.**

In summary proceedings by *landlord* against *tenant* to obtain possession of demised premises, this court have no authority under the *common law certiorari* to quash the proceedings, although the officer having charge of the matter *improperly refuse to grant an adjournment*; nor have they authority to do so, although it appear from the return that the *title of the landlord had expired*, and yet that a verdict was found in his favor, and that the tenant was dispossessed.

LANDLORD and tenant. In this case Green instituted proceedings against Wilson, under the statute, for holding over after the expiration of his term, certain premises which had been demised to him. In the progress of the cause, Wilson applied for an adjournment, which was refused by the judge before whom the proceedings were had. A trial was then had before a jury, who found a verdict in favor of Green. Wilson sued out a *certiorari*, to which a return was made *setting forth the evidence in the cause*.

*W. H. Shankland*, for the plaintiff in error.

*B. Niles*, for the defendant in error.

*By the Court, COWEN, J.* The affidavit upon which the application was made for an adjournment was clearly insufficient; but if otherwise, we cannot notice the objection. It is not properly a part of the record.

The return, I think, shows that, in evidence on the trial, the defendant proved that the plaintiff had parted with his title before he commenced the proceedings; but that we cannot notice, according to the case of *Birdsall v. Phillips*, 17 *Wendell*, 464.

Proceedings affirmed.

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 DIOYT v. TANNER.
 

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## DIOYT vs. TANNER.

In *slander*, a plaintiff may in the same count charge words not actionable *per se*, with words actionable in themselves, in aggravation of damages; and in such case the defendant is not at liberty to *demur* to some of the words and take issue upon the others.

It is not a *misjoinder* of causes of action to charge in the same count words imputing to the plaintiff, that he had counterfeit bills in his possession with the intent to pass the same, and that he had in his possession plates in the similitude of bank bills, with intent, &c.

**DEMURRER** to declaration. The plaintiff declared in *slander*, charging the defendant with speaking words imputing to him the crime of *forgery*, in respect to bank bills. The words were variously laid to have been spoken, as, that the plaintiff had been counterfeiting bills and money; had counterfeit notes in his possession with intent to pass; had plates in his possession in the similitude of bank bills, with the intent of using the same, &c.; had been sent to the state prison for passing counterfeit bills, and that two gentlemen who went to Pennsylvania with their big guns had got into trouble, had been taken up and sent to the state prison for passing counterfeit money, (meaning by the two gentlemen the *plaintiff* and another person.) The defendant pleaded *non cul.* as to the speaking the words specified in the count, *except as to what related to the two gentlemen who went to Pennsylvania, &c.* and as to that matter *demurred* specially for the want of necessary averments to render the words actionable. The plaintiff took issue upon the former part of the plea, and as to the latter joined in demurrer.

*W. H. Shankland*, for the defendant, insisted 1. That the count containing *distinct* and *disconnected* causes of action, was bad for *duplicit*y and *misjoinder*; 2. That some of the words specified in the count are not actionable *per se*, and are not rendered so by introductory matter or by proper averments; and 3. That if two or more causes of action can properly be joined in the

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Dioyt v. Tanner.

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same count, the defendant may *demur* to one or more of the causes of action, and plead to the others. In support of the last proposition he cited 1 *Chitty's Pl.* 643; 11 *East*, 565; 11 *Johns. R.* 24.

*J. Thomas*, for the plaintiff. Different sets of words imputing the same charge may be included in the same count. 6 *Wendell*, 412. If the words demurred to are not actionable, they may be considered as surplusage, or as alleged in aggravation; being joined with other words admitted to be actionable, and charged to have been spoken in the same conversation, they are to be coupled together in the inquiry as to who is the person accused. 6 *Wendell*, 410. The defendant having charged *forgery* upon the plaintiff in the commencement of the conversation, the inference is inevitable that he was one of the persons alluded to when the defendant spoke of the two gentleman, &c. The by-standers must so have understood the defendant, although he did not repeat the plaintiff's name after every pause in his speech.

*By the Court*, NELSON, Ch. J. It is well settled that words not actionable in themselves may be laid in the same count with words actionable, and may be proved to show the *quo animo* or in *aggravation* of damages. It cannot, therefore, be permitted to the defendant to select the words not actionable and *demur* to them, taking issue upon the others. 6 *Wendell*, 407, 410. 3 *Wilson*, 185. 2 *East*. 438. 2 *Saund.* 307, n. 1, a. 1 *Campb.* 49, n. If the defendant insists that the words demurred to are actionable, then he must fail of course, as he should have included them in the plea of the general issue, or set up some other defence; and this he should have done whether the words laid constituted a distinct cause of action or not.

There is nothing in the suggestion that the count contains a misjoinder of distinct causes of action; the words relate to the same crime. 2 *R. S.* 674, § 39.

Judgment for plaintiff.



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 Smith v. Janes.
 

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## SMITH vs. JANE.

*Checks* are governed in several particulars by the same rules that prevail in relation to *inland bills of exchange* payable either *on demand* or at a given number of days *after sight*.

The holder of a check can recover against the *endorser* only when he has used *due diligence* in presenting or giving notice of demand and non-payment.

Where the parties all reside in the same place, the check should be presented on the day it is received, or on the following day; and when payable at a different place from that in which it is negotiated, it should be *forwarded by the mail* on the same or next succeeding day for presentment.

No greater diligence is necessary in presenting *checks* for payment, than is required in relation to *bills of exchange*.

In an action by a *second endorsee* of a check against the payee, *laches* on the part of the first endorsee *will not be presumed*; if there was negligence on his part it must be affirmatively shown by the defendant.

So where the *second endorsee* has put the check in *circulation*, *laches* will not be presumed in a subsequent holder, where the bill was in circulation only four or five days after the second endorsee parted with it, before it was sent for presentment; if there be a default the burden of the proof rests upon the defendant.

But where, by the course of the mail, the check may be presented in *three days*; and the holder instead of putting it in circulation, *holds it in his possession* seven or eight days, he is chargeable with want of due diligence.

*How long* a bill or check, payable *on demand* or at a given number of days *after sight*, may be *kept in circulation* before presentment, without discharging an endorser, is an unsettled question. Each case must be determined by its own circumstances.

Where a *second endorsee* of a check on receiving it *put it in circulation*, and not more than four or five days elapsed thereafter before it was sent for presentment, *it was held*, in an action by him against the payee that he was not chargeable with *laches*; there being no evidence in the case but that he became the holder on the day it was negotiated by the payee.

Where a *notary* certifies that he deposited in the post-office notices of protest for the the endorser, it will be presumed that such notices were *directed* to them.

THIS was an action of assumpsit tried at the New-York circuit in June, 1838, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The plaintiff as endorsee, sued the defendant as endorser of two *checks* drawn by B. Rathbun, on the Commercial Bank of Buffalo: one for \$2,000, dated July 17, 1836, payable to the order of and endorsed by the defendant, who resides in the city

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Smith v. Janes.

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of New-York. It was endorsed and negotiated to the plaintiff, in the city of New-York, by *Wood & Bogert*, of that place, on the 27th or 28th day of July, and the plaintiff on the same day endorsed and negotiated it to *F. H. Pepoon*. The check was presented at the bank and protested for non-payment on the 4th August, 1836. No account was given of the check between its date and the time it was negotiated to the plaintiff, nor between the time that the plaintiff put it in circulation and the day of presentment and protest. The course of the mail at that time between New-York and Buffalo was three days each way. The other check was for \$3,000; and the facts concerning it were the same as in relation to the \$2,000 check, except it was dated July, 28, 1836, was negotiated by *Wood & Bogert* to the plaintiff, on the 29th or 30th day of that month, and by the plaintiff to *Pepoon*, on the same day, and was presented at the bank, and protested for non-payment on the 9th of August following.

The certificate of the notary in each case, after stating the demand, &c. at the bank in Buffalo, proceeded as follows: "I further certify that on the same day and year above written, I deposited in the post-office notices of the foregoing protests for *F. H. Pepoon*, Albany, *John T. Smith*, New-York, *Wood & Bogert*, New-York, *Horace Janes*, New-York, *E. Olcott*, Albany."

The defendant moved for a non-suit, on the grounds: *first* that the checks were not presented in due season to charge the defendant as endorser; and *second*, that the proof of notice of protest was insufficient, for the reason that the notary had not certified that the notice was directed to the defendant. The judge refused the motion, and the defendant excepted. Verdict for the plaintiff. The defendant moves for a new trial.

*J. A. Spencer*, for defendant.

*R. Lockwood*, for plaintiff.

*By the Court*, BRONSON, J. In several particulars, checks are governed by the same rules that prevail in relation to inland

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Smith v. Janea.

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bills of exchange, payable either on demand, or at a given number of days after sight. The holder can recover against the endorser only when he has used due diligence in presenting the check, and giving notice of the demand and non-payment by the bank. When the parties all reside in the same place, the holder should present the check on the day it is received, or on the following day: and when payable at a different place from that in which it is negotiated, the check should be forwarded by mail on the same or the next succeeding day for presentment. It has been said that greater diligence is necessary in presenting checks for payment, than is required in relation to bills of exchange. *Gough v. Staats*, 13 *Wendell*, 549. But I can see no good reason for making such a distinction. The fact that one instrument is drawn upon a bank, and the other upon an individual, can make no difference in principle concerning the duty of the holder; what will be due diligence in the one case will, I think, be due diligence in the other. *Mohawk Bank v. Broderick*, 13 *Wendell*, 133.

As the questions are substantially the same in relation to both checks, I shall only notice that for \$2,000, dated July 17, 1836. If this check was negotiated to Wood & Bogert on the day of its date, and retained by them ten or eleven days until it was passed to the plaintiff, the defendant would be discharged; but it does not appear when, or to whom the check was first negotiated. It may have been transferred by the payee to Wood & Bogert, on the same day they sold it to the plaintiff, or if negotiated before that time it may have passed through several hands before it was taken by Wood & Bogert. This is not a case where we can presume laches. The defendant is the payee of the check, and must know when and to whom it was first transferred; and the burden lies on him of making out a default in some holder of the check, before it came to the hands of the plaintiff.

The course of the mail between New-York and Buffalo, was only three days, and as seven or eight days elapsed between the time the plaintiff took the paper, and the day it was presented to the bank for payment, the plaintiff would be chargeable with

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Smith v. Jones.

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a want of due diligence, if he had not put the check in circulation. But he sold it to Pepoon on the same day it was received, and there is no proof of negligence in Pepoon or any subsequent holder of the paper. If the defendant intended to rely on any default after the check passed from the plaintiff, the burden of making out the case lay upon him. We cannot presume laches, especially in a case where the paper was in circulation for so short a period. How long a bill or check, payable on demand, or at a given number of days after sight, may be kept in circulation before presentment, without discharging some of the parties, is not a settled question. *Chitty on Bills*, 276, ed. of 1826. It depends in a great degree on the circumstances of each particular case. In *Robinson v. Ames*, 20 *Johns. R.* 146, the bill was drawn in Georgia on merchants residing in New-York, and although 75 days elapsed before the presentment, it was held that the drawers were not discharged. In *Gowen v. Jackson*, 20 *Johns. R.* 176, the bill was drawn in Antigua, on merchants residing in London, and having been put in circulation, it was held that the drawer was not discharged, although six months had elapsed before the presentment. In *Aymar v. Beers*, 7 *Cowen* 705, the bill was drawn in New-York on a house in Richmond, Va., at three days sight, and it was held that the drawer was not discharged by a delay of 29 days in presenting the bill for acceptance. The bill had not been put in circulation, but there were other special circumstances to show that the payee was not chargeable with negligence. In the case at bar, three days were necessary for the transmission of the check from New-York to Buffalo, and it could not have been in circulation after it passed from the plaintiff, more than four or five days before it was presented at the bank for payment. There is no authority for imputing laches on such a state of facts, and the judge was right in overruling the objection.

The official certificate of a notary is, in certain cases, declared presumptive evidence of the facts which it contains. *Laws of 1838*, p. 395, § 8. It is not denied that the certificate was properly in evidence, but it is said that the facts stated by the notary

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Vance v. Bloomer.

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do not prove due notice. Several objections to the sufficiency of the proof were mentioned on the argument, but this is a bill of exceptions, and we cannot look beyond the particular objection taken on the trial. The defendant resided in New-York, and payment was demanded at Buffalo. The notary certifies that on the same day he "deposited in the post-office notices of the foregoing protest, for—Horace Janes, New-York." The objection on the trial was, that the notary had not certified that the notice was *directed* to the defendant. When a public officer, in the course of his official duty, certifies that he deposited a notice in the P. O. *for* a particular person, it is, I think, but a reasonable intendment that the notice was *directed* to that person. We cannot presume the contrary without imputing a gross dereliction of duty to the officer.

New trial denied.

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VANCE vs. BLOOMER.

On a note payable in *ready made clothing*, the payee has no right to demand a garment which has been made for a *customer* at a stipulated price. The holder of a note of this kind, *if seems*, may demand payment of it *in parcels*, and is not bound to take clothing to its full amount at one time. So *if seems* that to sustain an action on such note there must be a demand and refusal.

ERROR from the superior court of the city of New-York. Bloomer sued Vance in the marine court of the city of New-York on a due-bill in these words: "Due G. Bloomer or bearer 44 dollars 30 cents, to be paid in ready made clothing after this date." (Signed) James Vance. The due-bill was dated 19th February, 1835, and to it was attached a memorandum in these words: "N. B. Clothes will not be made to measure." A witness of the name of *Wade* testified that in behalf of the plaintiff

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Vance v. Bloomer.

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he demanded of the defendant, at the store of the latter, who kept a clothing store, a ready made coat lying on the counter, in part payment of the note. A witness for the defendant testified that the defendant told Wade that the coat had been made for a Mr. *Doremus*, who had promised to pay cash for it, but that he might take any other ready made clothing on the shelves. *Wade* knew that the coat had been made by measure for *Doremus*, and that he agreed to pay \$25 for it. Before the demand by *Wade*, a request had been made by *Doremus* to have the coat delivered to him without paying the price, but *Vance* refused to let him have it. *Doremus* had since been compelled to pay for the coat. *Wade* testified that *Vance* did not offer any other goods, and that had he done so, he would have settled with him on the spot. He acknowledged that he did not demand any other article; he said he would not have demanded a customer's coat, but he supposed it had been refused by *Doremus*, and that he wanted that particular coat. The defendant objected that the action would not lie, because no demand of payment had been made. The marine court rendered judgment for the plaintiff for the full amount of the note, viz. \$44.30, and the superior court, on *certiorari*, affirmed the judgment. The defendant sued out a writ of error.

*L. Sanford*, for plaintiff in error.

*H. M. Western*, for defendant in error.

*By the Court*, COWEN, J. It is not denied that a special demand at the store of the defendant below, and a refusal to perform, were necessary in order to maintain the action. *Lobdell v. Hopkins*, 5 Cowen, 516. The necessity for this was formerly doubted and left quite questionable by *Thomas v. Roosa*, 7 Johns. R. 461; and in a recent case in Pennsylvania, a majority of the court said that though no time nor place be fixed by the contract for delivery, it lies with the debtor to tender within a reasonable time, *Roberts v. Beatty*, 2 Pennsylv. R. 71, 2, *Houston, J. doubting*. The balance of the cases relied on certainly sustain that position in respect to contracts of delivery which are specific as to time.

## Vance v. Bloomer.

There the promisor must move ; and if no place be appointed, must either make a tender personal to the promisee, or where the goods are ponderous, get him to appoint a place before the day. *Id.* 67, 68, 71, and the cases there cited. But see several Kentucky cases, that where no place is appointed, though the day be fixed, the place shall be deemed the residence of the debtor. They are cited *id.* 71 ; and see some of the same cases cited 5 Cowen, 518, note. In *Mingus v. Pritchett*, 3 Dev. 78, an agreement to pay a certain sum in *good trade*, on or against the first of March, was held to devolve on the covenantor the necessity of calling for an appointment of place before the day ; and in these and the like cases, he must show himself ready to the last moment and uttermost convenient time of the day at the proper place, with the goods specifically set apart and designated, so as to enable the promisee to maintain trover in case they be not afterwards delivered on demand, and this whether the promisee or his agent be there or not. *Tiernan v. Rapier*, 5 Verg. 410, 414, 415. *Roberts v. Beatty*, 2 Pennsylv. R. 67 to 69, and the cases there cited. *Chipm. on Cont.* 96, et seq. *Nichols v. Whiting*, 1 Root, 443. Any accident or inevitable necessity shall not excuse him, for he might have provided against that by his contract. *Roberts v. Beatty*, 2 Pennsylv. R. 67. *Paradine v. Jane, Aleyn*, 27. And he is bound to tender the whole ; for the contract is entire, and the promisee is not bound to receive but a part. *Roberts v. Beatty*, 2 Pennsylv. R. 69, 70. But the parties may, by consent, sever the contract, delivering and receiving part at a time, when it becomes but a contract for the residue. *Roberts v. Beatty*, 2 Pennsylv. R. 69, and the books there cited.

On the other hand, where time and place are both left open, *Lobdell v. Hopkins* settles the rule with us on a reasonable basis, and such as conforms to the usual course of business. The note is then payable on demand, the payee has, in that case, the election as to time ; and, in the case of chattel notes, a special request must be shown at the promisor's place of business. Contracts like the one in question, payable in merchant's

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goods are very common, the practice under them generally known and the law well summed up by Mr. Chipman, in his essay on such contracts, 28, 29. "If," says he, "a merchant give a due-bill to A. payable in goods, and no time or place of payment be designated, the due-bill contains an acknowledgment that A. has paid him in advance for the amount in goods therein expressed; and a promise is implied on the part of the merchant, that whenever A. shall call at his store and present the due-bill, he will deliver to him such articles as he shall select out of the goods on hand. The store of the merchant is the place of payment; and no action can be maintained on the due-bill, until A. shall call at the store of the merchant for the goods, and the merchant shall refuse to deliver such goods as A. shall select. Indeed A. is to be treated as other customers are to be treated. He has a right to call for a part of the goods at a time, and the merchant has no right to require that the whole amount shall be received at one time. The merchant is also required to deliver the goods at the market price, and has no right to charge them at a higher price; and A. has no right to require the price of the goods to be reduced, on the ground that he can purchase the goods cheaper at another store; for it is to be presumed that A. at the time he made the contract, knew at what price the merchant sold his goods, and paid a consideration accordingly." This exposition seems to have been very successful in following the rule laid down with regard to a like contract, in the very learned case of *Roberts v. Beatty*, to which I have already often referred, 2 *Pennsylv. Rep.* 65. Ross, J. there said, "We must consider the subject matter of the agreement; the object of making it; the sense in which the parties mutually understood it at the time it was made; the place where it was entered into; the use to which any articles stipulated to be delivered were to be applied; if materials for building, when and where to be used; and finally the practical exposition, and the general understanding, custom and usage amongst those who enter into similar contracts, in the execution and performance." The meaning and practice of parties, as laid down by Mr. Chipman, are slightly anomalous,



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especially in respect to the demand of partial payment from time to time, if not in respect to the place of demand. But it is believed that the course of business is so very well settled as to warrant the departure.

It can hardly be doubted, therefore, that in the case at bar, the demand was properly made of a specific piece of goods, although it would not have reached the full sum in value. The promisee is to call for parcels as shall be most convenient to himself. But it was neither conformable to the usage of business nor according to justice nor law, that he should demand goods belonging to another though on the shelf of the promisor. It was, at least, to set himself against another customer of the defendant below, who had obtained an honest preference, and if that customer would give way, still the defendant had a right, as he did in this instance, to retain the article bespoke and made to measure, with a view to enforce the particular contract of sale. Indeed the bargain for the coat was struck between the defendant and Doremus, the property being transferred to the latter, subject to a lien in the defendant for the price. It was captious in the plaintiff below, after being informed of the fact, still to persevere in a specific demand.

It is no answer to say that a demand was made importing that the plaintiff wanted his pay upon the note. It is not according to the fact. The agent who made the demand mentioned no goods as acceptable beside the coat. Having the right of selection, and being bound to make a demand, he should have made a proper one. He denies that the defendant offered to pay in other goods, as stated by W. Vance. But let us take it as we are bound to do on writ of error, upon such a conflict between the witnesses, that there was no offer by the defendant to pay. He was not bound to offer ; but only to comply with a proper demand. Suppose his own coat had been demanded from the counter. The demand in question was no more within the contract. To be faithful to his other customer, and his own rights, he could do no less than meet such a demand with such an explanation as he gave: "The coat belongs to Mr. Doremus."

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It was useless for Wade the agent to say as a witness that he would have taken other goods in full. He should have said so as an agent; but did not. There seems to have been an effort by him for some reason not justifiable, at least not justified, so to shape his demand as to turn the instrument in question into a money claim. We think he has failed to do that, and that the judgment of the superior and marine courts must be reversed.

Judgments reversed.

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WATSON vs. RANDALL.

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An agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt; but to render the promise obligatory, it must be in writing.

Whilst the debt remains a subsisting demand against the original debtor, the promise of the third person is collateral and must be in writing. See comments upon the case of *Furley v. Cleveland*, reported in 4 Cowen, 442, and 9 Id. 639.

ERROR from the Tompkins common pleas: Randall sued Watson in a justice's court on a promise made by him, *that if the plaintiff would not sue Mrs. Thomas, the mother of the defendant, for the recovery of a debt which she owed to him, that he would pay the debt by a certain day.* At the time of the making of the promise, the plaintiff threatened to proceed against the mother of the defendant by *attachment*, having been informed that she had absconded, and that property belonging to her was in the possession of the defendant. The plaintiff being a non-resident, a short summons was issued, which was returned *personally* served. On the day of its return, the plaintiff appeared, but the defendant did not. The plaintiff declared, and the cause was adjourned to a future day, when witnesses were called and sworn on the part of the plaintiff, who proved the indebtedness of the mother of the defendant, and the defendant's promise as above stated, and that he on his part *promised not to sue the defendant's mother*, but that he would *look to the defendant for*

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*the payment of the debt.* The justice rendered judgment for the amount of the plaintiff's demand, which judgment was affirmed by the Tompkins common pleas. The defendant sued out a writ of error.

*G. G. Freer & S. Love*, for the plaintiff in error, insisted that the promise was void within the statute of frauds. The liability of the original debtor remained, and she could not avail herself of the plaintiff's promise; the promise of the defendant therefore was collateral, and to be binding, should have been in writing.

*W. H. Shankland*, for the defendant in error, contended that the promise *not to sue*, being indefinite and not for a limited time, was equivalent to a *release*, and was therefore a valid consideration for the defendant's promise. 1 *Rolle's Abr.* 27, pl. 45. 1 *Comyn on Cont.* 51. 2 *Id.* 421. 19 *Johns. R.* 129. 6 *Wendell*, 471. If so, it was not necessary that the promise should be *in writing* to render it obligatory. Besides, it does not appear that the promise was by *parol*, and the court will intend in support of the judgment that it was *in writing*. 7 *Johns. R.* 99. 8 *Id.* 148. Even though the debt remained a subsisting demand against the original debtor, the promise of the defendant was valid and obligatory, although not in writing. *Farley v. Cleveland*, 4 *Cowen*, 432; affirmed on writ of error, 9 *Cowen*, 639.

*By the Court*, NELSON, C. J. The action is sought to be sustained upon the ground that the legal operation and effect of the agreement on the part of the plaintiff below was to discharge Mrs. Thomas, the original debtor; and as the demand no longer subsisted against her, the undertaking could not be said to be *for the debt of another*. If this view could be sustained, there is no difficulty in the case. 1 *Barn. & Ald.* 297. 1 *Comyn on Cont.* 59. 2 *Seko.* 621. 1 *Saund.* 211, note 2. But assuming (what I should be disposed to deny,) that the forbearance to sue Mrs. Thomas, according to the true construction of the agree-

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ment with the defendant was to be perpetual, *the debt was still subsisting* as to her, as it is clear she could not avail herself of the agreement by way of defence, not having been a party to it.

A *covenant*, and perhaps a valid *parol promise*, never to sue a *sole* covenantor or promissor, may be pleaded in bar of the action by way of release, upon the principle of avoiding circuity of action; for if a suit be allowed, a cross action must be brought for a breach of the covenant to recover back the amount. The rule is founded upon the maxim of the law, that courts should so judge of contracts as to prevent multiplicity of actions; but it does not apply where the recovery in both actions would not be equal. In such cases, it would be manifestly unjust to permit the right of action that might accrue to a defendant to recover *inferior*, to be pleaded in bar of the right to *larger* damages. *Cro. Eliz.* 352, 623. 2 *Saund.* 48, note 1. *Id.* 150, note 2. 1 *T. R.* 446. 8 *id.* 486. 6 *Wendell*, 291. *Id.* 474. 15 *Mass. R.* 112. 4 *id.* 414. 8 *Pick.* 230. 6 *Taunt.* 289. Suppose the plaintiff in this case had sued Mrs. Thomas the next day after the defendant's promise, and recovered the debt, what remedy had she against the defendant below? Certainly none. She would but pay her own debt. And even if Thomas, the defendant below, could sustain an action at all for a breach of the agreement with him not to sue his mother, the damages could, at most, be but nominal. If the defendant had actually paid the demand, agreeably to his undertaking, and then the plaintiff had sought to recover it of Mrs. Thomas, there would be reason in the application of the principle; for then, if the recovery was allowed, a cross action would be necessary, and the measure of damages would be equal in both cases.

The case of *Rothery v. Curry*, *Bull. N. P.* 281, is in point to shew that Mrs. Thomas cannot avail herself of this agreement, even if binding upon the plaintiff as between him and the defendant. There, in consideration the plaintiff would not sue A., the defendant promised to pay, &c.; this was holden to be within the statute, for no consideration was laid for the plaintiff's pro-

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mise not to sue; and if otherwise, A. *could not avail himself of the agreement, and the debt was still subsisting*. The cases are all uniform on the point, that the promise to pay, in consideration of forbearance, is within the statute. *King v. Wilson*, 2 Str. 874. *Fish v. Hutchinson*, 2 Wendell, 94. *Kirkham v. Martyr*, 2 Barn. & Ald. 613. 1 Sand, 211, a. 2 Selw. 622. In the case of *Kirkham v. Martyr*, the agreement was express that the plaintiff was not to bring an action against the son, yet the parol promise of the father was holden to be void. The cases in this court have been in conformity with the exposition of the law by the English authorities. 4 Johns. R. 422. 12 id. 291. 4 Cowen, 432. The two former cases are in no respect shaken by the remarks of the chief justice in the latter, upon the point in question here; he evidently doubts the soundness of the cases upon another ground, i. e. that they might have been regarded as *original promises*, the defendants in each case having received property from the debtor as inducement to the undertaking; but there is no intimation, nor any thing in the case from which it can be inferred, that the absolute *agreement to forbear* operated as a *discharge* of the original debtor and took the case out of the statute. Nor is such an intimation to be found in any of the cases to which I have been referred or have examined; but the contrary has been expressly ruled, as has already appeared. See also the opinion of Chief Justice Savage, in *Smith v. Ives*, 15 Wendell, 182.

The justice of this case is very strongly with the plaintiff below, and I should be glad to support the judgment, but I am satisfied it cannot be done without overturning an unbroken series of authorities since the statute of frauds.

Judgment reversed.

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 Salter, v. Burt.
 

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## SALTER vs. BURT.

To charge the endorser of a *postdated* bank check falling due on *Sunday*, presentment for payment must be made on the next day, and notice of non-payment given to the endorser; presentment on *Saturday*, the day preceding its maturity, is a nullity and discharges the endorser.

When the day of performance of contracts other than instruments upon which *days of grace* are allowed, falls on *Sunday*, that day is not counted, and compliance with the stipulations of the contract on the next day (*Monday*) is deemed in law a performance.

DEMURRER to declaration. The action was against the defendant as the endorser of a check drawn by *Benjamin Rathbun*, on the cashier of the Bank of Buffalo for \$500, payable to the defendant's order. The check was dated August 21, 1836, but as the count alleged was drawn on the 9th day of that month. The 21st day of August was *Sunday*, and payment of the check was demanded and notice of non-payment given to the defendant on *Saturday* the 20th day of the month.

*C. A. Mann*, for the defendant. A *post dated* check falls due on the day it purports to bear date on its face, and days of grace are not allowed on checks. A bill of exchange has days of grace, and then if the third day is *Sunday*, payment may be demanded on the preceding day by the custom of merchants; but in no other case can payment be demanded *before the debt has become due*. This check had not a legal existence until the *twenty-first* of August, and it would have been in time to charge the endorser if presented on the next day. The drawer was not obliged to provide funds until the *twenty-second*, knowing that the check could not be presented until that day. The presentment of the check on the *twentieth* was therefore a nullity, and as there was no subsequent presentment, the declaration shows no cause of action. The case of *The Mohawk Bank v. Broderick*, 10 *Wendell*, 304, and 13 *id.* 133, S. C. in the court of errors, is directly in point in support of the demurrer.

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*J. A. Spencer*, for the plaintiff. A bill of exchange falling due on *Sunday*, must be presented on the day preceding. This check fell due on *Sunday*, and was therefore correctly presented for payment on the preceding *Saturday*. This is the rule of law in respect to *commercial paper*, and surely *checks* belong to that denomination of instruments. The circumstance of days of grace not being allowed on checks cannot alter the rule as to the time of presentment. The only effect of allowing days of grace, is to make bills payable three days *after* the time specified in the body of the bill ; but when the day of payment of a bill is ascertained by adding three days, and that day happened to be *Sunday*, the presentment must be on *Saturday* the second day of grace : in other words, it must be presented on the day *preceding* that on which the bill falls due. So in relation to checks, when the day of payment happens to be *Sunday*, the check must be presented on *Saturday*. The convenience and safety of commercial transactions require that there should be uniformity in the law on the subject, and that different rules should not exist in respect to different classes of commercial paper which are distinguished from each other only in name.

*By the Court*, BRONSON, J. This check, having been post dated, was payable on the day of its date, without any days of grace. *Mohawk Bank v. Broderick*, 10 *Wendell*, 304. 13 *id.* 133. It fell due on *Sunday*, and the question is whether the demand of payment was well made on the previous *Saturday*, or whether it should have been made on the following *Monday*. When days of grace are allowable on a bill or note and the third day falls on *Sunday*, the bill or note is payable on the previous *Saturday*. The same custom of merchants which, as a general rule, allows three days of grace to the debtor, has limited that indulgence to two days in those cases where the third is not a day for the transaction of business. But when there are no days of grace, and the time for payment or performance specified in the contract falls on *Sunday*, the debtor may, I think, discharge his obligation on the following *Monday*. This question was very

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fully considered in *Avery v. Stewart*, 2 Conn. R. 69, which was an action on a note, not negotiable, which fell due on Sunday; and the court held that a tender on Monday was a good bar to the action. I agree to the doctrine laid down by *Gould, J.*, that Sunday cannot, for the purpose of *performing* a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time mentioned in a contract for the doing of an act, *intervening* Sundays are to be counted, but when the day for performance falls on Sunday, it is not to be taken into the computation. The check was presented before it became payable, and the demand and notice were consequently insufficient to charge the endorser.

Judgment for defendant.

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FARRINGTON vs. MORGAN.

In a return to a *certiorari* to bring up proceedings had under the statute against a tenant for holding over, it must affirmatively appear that the officer to whom the precept for that purpose was directed, was commanded to summon *eighteen reputable persons qualified to serve as jurors* in courts of record, who had been nominated by the magistrate before whom the proceedings were had, or the proceedings will be quashed; it is not enough that the return states that the officer was commanded to summon a jury as directed by the statute.

It is erroneous in such case to summon *twenty* instead of *eighteen* jurors; especially if the tenant object to the proceeding.

Summary proceedings are open to technical objections, unless the statute under which they are had requires that they shall be liberally viewed by the courts.

LANDLORD and tenant. Proceedings were commenced by Morgan against Farrington before an assistant justice of one of the wards of the city of New-York for *holding over*, after the expiration of the term, certain premises demised to him. In a return to a *certiorari* the justice certified that after issue was joined between the parties, he "issued a *venire* directed to a constable or marshal to summon a jury as directed by the statute;" that on the day of the return of the *venire* the parties appeared,



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and that "upon an examination, it appeared that *twenty names* had been put upon the venire;" that after some delay, the whole number of jurors summoned attending, a jury of *twelve* were sworn to try the cause, who, after hearing the evidence, found a verdict in favor of the landlord. In a supplementary return the justice stated that the counsel for the tenant insisted that a *venire* should have been issued to summon *eighteen persons* qualified to serve as jurors in courts of record, but that the counsel not objecting to any of the jurors as summoned, and he (the magistrate) not knowing but that the jurors drawn for the trial of the cause were such as required by the statute, he overruled the objection. The tenant sued out a *certiorari*.

G. B. Hall, for the tenant.

H. Nicoll, for the landlord.

*By the Court*, COWEN, J. The proceedings must be reversed. The statute, 2 R. S. 423, § 35, 2d ed. directs that the magistrate shall, in order to form the jury, "nominate eighteen respectable persons qualified to serve as jurors in courts of record," who are to be summoned; and by § 36, twelve are to be ballotted for as the jury of trial.

In this case, twenty were summoned, and the jury formed from that number. This being a summary proceeding in derogation of the common law, the statute should be strictly pursued; and that must appear affirmatively on the return. The summoning of twenty persons was an excess of jurisdiction. It is said *omne majus in se continet minus*, but that might equally be said of an hundred or a thousand. The error would be fatal in any court, an objection being taken as it was here. It would be good cause of challenge to the array. But above all, in this summary proceeding it should appear expressly that the eighteen nominees of the magistrate formed the jury of ballot; and that twelve of the same eighteen, they being all summoned, formed the jury of trial. In *Rex v. The Commissioners of Sewers of Somerset*, 7

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*East*, 71, the jury having been improperly summoned, the proceedings were quashed, although the defendants appeared and interposed no objection. In that case the sheriff's return was informal, being of *the foremen of the juries*; not the *juries themselves* as required by the act. Lord Ellenborough, C. J. went so far as to say there was a want of jurisdiction, which might be taken advantage of as well after as before verdict; and even consent of parties could not give jurisdiction. And in *Birket v. Crozier*, *Mood. & Malk.* 119, the venire being too narrow, as not directing the sheriff to summon from the county at large, but from those of the county *resident at the Tower Hamlets*, the collector acting under a consequent warrant of distress was holden to be a trespasser. Summary proceedings are, in general, open to objection for technical omissions, imperfections or defects in the return, and proceedings under the landlord and tenant's act are not an exception. They are not like proceedings in a justice's court, expressly required by statute, *vid.* 2 R. S. 185, § 181; 2d ed., to be liberally construed so far as form is concerned; but the magistrate must shew a strict compliance with the statute at every step. He can not order twenty jurors, simply because the statute requires him to nominate but eighteen. Much is sought to be inferred by the counsel for the defendant in error from general words: *as directed by the statute, &c.* That will not do. The return should show particulars. It is quite too general in more respects than one. Why does the justice say he did not know but the jurors were properly qualified? What sort of compliance with the statute is this, which commands him to know and nominate proper persons?

Proceedings reversed.

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Ford v. Monroe.

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## FORD vs. MONROE.

In an *action on the case for negligence* in driving a carriage, whereby the son of the plaintiff was run over and killed; IT WAS HELD, that the *loss of service* of the child, and *expense* occasioned by the sickness of the plaintiff's wife, caused by the shock to her maternal feelings, were proper items of damage: the same being laid as *special damage* in the declaration.

In an action against a *master* for the *negligence* of his *servant*, it cannot be urged on a motion for a new trial, that the evidence did not establish the relation of master and servant, if such objection was not taken on the trial, either by motion for a non-suit, or by calling the attention of the judge to the point in his charge to the jury.

THIS was an *action on the case*, tried at the Saratoga circuit in May, 1833, before the Hon. ESEK COWEN, then one of the circuit judges.

The declaration charged, that by the *negligence* of a servant of the defendant in driving a gig, a son of the plaintiff of the age of about ten years, was run over and killed. In one of the counts it was alleged, by way of *special damage*, that in consequence of the occurrence, the wife of the plaintiff became sick, and remained so for a long time, and that the plaintiff was not only deprived of her society, but was subjected to great expense in attendance upon her and in effecting her recovery; and in another of the counts, the damage alleged was the *loss of the service of the child* for a period of ten years and upwards. The happening of the accident and the sickness of the plaintiff's wife as alleged in the declaration were proved. The judge instructed the jury that the only question in the case was whether the servant had been guilty of *negligence*; that if they should find that he was chargeable with negligence, that then the plaintiff would be entitled to recover such sum by way of damages as they should be of opinion the *service of the child* would have been worth to him until he became 21 years of age; and also that he was entitled to recover the damages occasioned by his wife's sickness, consequent upon the accident. The jury found a verdict

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for the plaintiff with \$200 damages. The defendant moved for a new trial.

*W. L. F. Warren*, for the defendant.

*N. Hill, jun.*, for the plaintiff.

*By the Court*, NELSON, Ch. J. The main ground urged in support of the application for a new trial is, that the proof failed to establish that the servant was acting in the business of the master, or within the scope of his authority. The answer to which is that the point was not made upon the trial, neither in the motion for a non-suit or after the testimony had closed. The cause seems to have been tried and defended upon the assumption of the existence of the relation of master and servant between the defendant and the person driving the carriage. Had the objection been taken, more full proof might have been called out, so as to have placed the question beyond doubt. If the point had been put forth in due season, as the evidence stands, the judge would have been bound to have submitted it to the jury, and their verdict would have been well warranted. It would therefore be unreasonable to disturb the verdict upon the ground now urged, as the counsel did not choose to avail himself of it when it could have been removed by his adversary by the production of further proof, or met by going to the jury upon that already given.

The damages were specially laid in the declaration, and were clearly proved to have been the direct consequence of the principal act complained of; they therefore came within the well settled rule respecting *special damage*.

New trial denied.

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Mott v. Small.

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MOTT vs. SMALL.

A contract entered into *guaranteeing* the payment of a note is not void on the ground of *maintenance*, but may be enforced in an action at law, although entered into for the express purpose of inducing the holder of the note to *release* a former holder who had transferred the note and guaranteed its payment, so as to render him a competent witness in an action for the recovery of the note.

Such former holder, on being *released* becomes a competent witness, although the substituted security was obtained by his procurement; the objection to him as a witness affects his *credibility*, but not his *competency*.

*It seems that by the Revised Statutes, the offence of unlawful maintenance is abolished, except as to buying and selling pretended titles to land, and falsely moving and maintaining suits.*

THIS was an action of *covenant*, tried at the Herkimer circuit, in November, 1837, before the Hon. JOHN WILLARD, one of the circuit judges.

George H. Feeter having transferred to the plaintiff a promissory note made by John D. Petrie and Adam Petrie, for the sum of \$313.23, payable with interest, bearing date 28th January, 1833, and having *guaranteed* the payment thereof, the plaintiff commenced a suit against John D. Petrie (the other maker having died) for the recovery of the note. When the cause was ready for trial, it was found necessary in order to resist a defence of payment set up by the defendant, that Feeter should be *released* from his liability as *guarantor*, so that he might be called as a witness in support of the action. Feeter thereupon procured the defendant to execute an instrument under seal, covenanting and agreeing with the plaintiff to pay to him the amount of the note made by the Petries with the interest thereof, and also the costs of the suit against John D. Petrie (including the defendant's costs, if the plaintiff should become liable therefor,) and of all suits in relation to the note in case the plaintiff should fail to recover said amount in the suit then prosecuted against John D. Petrie, or should be unable to collect the same in case he should obtain judgment therefor, provided that the plaintiff should prosecute the cause with due diligence. This covenant

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Mott v. Small.

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was stated to have been entered into in consideration of one dollar paid by the plaintiff to the covenantor, and also in consideration that the plaintiff, at the request of the covenantor, had *released* and *discharged* Feeter from his *guaranty* of the note made by the Petries. On this covenant the plaintiff declared, averring that he diligently prosecuted the suit, but that he failed to recover; a verdict having been found for the defendant, on which judgment was subsequently rendered for the defendant with the costs of the defence. He then assigned as breaches of the covenant, the non-payment of the amount of the note, the cost of the suit, and other costs incurred by reason of the filing of a bill in chancery by John D. Petrie in relation to the note. The defendant pleaded *non est factum* and various other pleas. On the trial of the cause, the execution of the covenant declared upon was proved, and it was also proved, that on its delivery to the counsel of the plaintiff, a *release* was delivered to Feeter from his liability under the *guaranty* executed by him, and that Feeter was sworn as a witness on the trial of the cause of the plaintiff against Petrie. After the testimony was closed, the defendant insisted that the *instrument declared upon was void for maintenance*; which objection, together with several others, was overruled by the circuit judge, who directed the jury to find for the plaintiff. The jury accordingly found a verdict for the plaintiff with \$783.68 damages. The defendant excepted to the decisions of the judge and procured a bill of exceptions to be sealed. At the last *May* term, the plaintiff moved for judgment on the ground of the *frivolousness* of the bill of exceptions, when all the exceptions were overruled except that above noted, in respect to which the court directed an argument. The cause was accordingly argued upon that point at the last *July* term, by

*J. A. Spencer*, for the defendant.

*C. Tracy & H. Denio*, for the plaintiff.

This case was kept under advisement until this term, when the following opinion was delivered :

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*By the Court, COWEN, J.* Several grounds are taken in the bill of exceptions, which were all overruled as frivolous at the May term, except the single one that the covenant was given for unlawful maintenance. That objection certainly would not have occurred to us, and I think we should have overruled it also, without argument, had it not been for what was said by Bayley, J. in *Bell v. Smith*, 7 Dowl. & Ryb. 846, 854; 5 Barn. & Cress. 188, S. C. and S. P.

The case of *Bell v. Smith* was an action against Bell for a total loss on a policy of insurance on goods, effected to and in the names of *Smith* and others; the interest being solely in *Arnet, Gibb, Robertson and Wimble*, and the policy being effected on their account. The action was commenced and tried in the C. B. where *Arnet* was received as a witness for the plaintiffs and a bill of exceptions taken. To remove his interest, *Arnet* had, before suit brought, released all his interest to the plaintiffs. The court of C. B., notwithstanding, had ordered *Arnet* and his co-assured to indemnify the plaintiffs against the costs; whereupon the plaintiffs, and the co-assured, and *Lachlan & Robertson* entered into an indenture of three parts, reciting the interest of the parties, the commencement of the suit, its object, the order of indemnity, &c. Then, by the same indenture, the assured in consideration of 10s. assigned all their right to *Lachlan & Robertson*, who covenanted to indemnify the plaintiffs, and these in consideration of 10s., released all claim for costs against the assured. *Arnet* was then examined on his *voir dire*, and admitted that the plaintiffs were agents for him and his co-assured in effecting the policy. A verdict and judgment passing for the plaintiffs, on his testimony with other evidence in the cause, and error being brought to the K. B. by Bell, the sole question was whether *Arnet* remained interested notwithstanding his own release and the indenture. The K. B. were unanimous in reversing the judgment, on the ground that he, with his co-assured, were still liable to pay the costs to the attorney on record of the plaintiffs, the suit evidently having been brought under their express or implied authority. In the course of Parke's argu-

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ment, by which he was endeavoring to show that *Arnet* had been freed from all interest, Bayley, J. said there was another view in which the point might be considered. "Here is a man who has a policy of insurance on which he knows he cannot recover in his own name, and cannot recover at all unless he himself becomes a witness. He therefore sells his interest in the policy to some body else, and gets a price for it, which he could not otherwise obtain, and then tenders his evidence in order to support the policy. Is not that something like champerty?" When he came finally to deliver his opinion, after concurring in, and enforcing the ground taken by Abbott, C. J., that *Arnet* was incompetent on account of his liability to the attorney on record, he added: "But I think it is impossible to consider him a competent witness for a *much stronger reason*. The action was originally brought at the instance of *Arnet* and his co-assured. It is then found that there is not sufficient evidence to support the action, and thereupon the parties resort to a description of machinery which militates against the doctrine of the assignment of choses in action, and is calculated to produce all the mischiefs which the doctrine of maintenance and champerty is calculated to produce. The first thing done is, that without consideration as far as we can see, *Arnet* releases to the nominal plaintiffs all his interest in the policy of insurance which is the subject of the action. Is that found sufficient? Finding that it is not, and feeling that the action could not be maintained, unless he could be considered in the light of a disinterested person unconnected with the transaction, the expedient is then resorted to of conveying to *Lachlan & Robertson* all his interest in the policy, for the valuable consideration of 10s. Now if a case of champerty or maintenance were put, can a stronger one than this be suggested? Here is an action brought by several persons originally interested, and as it cannot be sustained for want of evidence, one of those persons who would be considered as an interested witness, in the first place releases all his claim to the persons who are the nominal plaintiffs, and afterwards assigns his interest to his copartners for a mere nominal consideration. Upon what principle is the



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doctrine of maintenance considered as illegal? Because, as laid down in all the books, it encourages suits, and induces parties to go on with actions which could not otherwise have been supported. Now this was the very object of the machinery in question; for these deeds amount to an acknowledgment, that without the testimony of *Arnet*, the action could not be maintained, and it is impossible for any person to shut his eyes against the conviction, that this scheme was merely the result of machinery and contrivance. On these grounds, it appears to me, that it would work great mischief, if we were to hold that *Arnet* is a competent witness. Mr. Parke says, 'let these parties be punished, if this be the result of machinery and contrivance;' but it seems to me that one mode of punishment is to say, that a verdict obtained by such means shall not be of any avail." Holroyd, J. concurred in this reasoning; and Littledale, J. thought *Arnet* was interested as being liable to the defendant for costs.

On this case being mentioned at May term, we were desirous that search should be made in order to see whether the doctrine thus advanced had been at any time acted upon by the English courts; but counsel have failed to produce any case in which that has been done. On the contrary, it is impossible not to see that, taken in its full extent, the doctrine would impugn the principle on which the English courts themselves allow the interest of witnesses to be removed. The defendant's bail is an incompetent witness for him; yet ever since 1653, *Anon. Styles*, 385, it has been held that other bail may be received in his place, and he be thus made competent. This may be equally condemned as an expedient to maintain a defence. It is doubtless maintenance; but it is *lawful maintenance*, as is said of giving gold or silver to a poor man, to maintain his plea, and the like, which is called *maintenance justifiable*, in respect to the motive. *Vin. Abr. Maintenance*, (Q) pl. 1, and cases there cited. The becoming bail, and suing for indemnity were once, it seems, questioned as unlawful maintenance, but that was denied. *Id. Maintenance*, (E) pl. 1. Giving bail being lawful in itself, the case in *Styles*, and the constant prac-

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tice since that time, *Collet v. Jennis*, Rep. Temp. Hardw. 124, A. D. 1735, and see 2 Stark. Ev. 86, Am. ed. 1837, and other English books on evidence, shew that it is not made unlawful because the object is to let in other bail as a witness in the cause. In short, we may collect broadly, I think, from this practice that any arrangement which would be lawful in itself, is not made unlawful because the object is to maintain a suit or defence by letting in a witness. The object is not to violate the truth, nor shall such a purpose be presumed; but it is to take away the interest of the witness in order that he may be sworn and speak the truth. In the case at bar, no one will deny that the defendant might lawfully become a guarantor of the note to the plaintiff; and shall it be said that because it was to release and let in the testimony of a previous guarantor to maintain the suit, it was therefore unlawful? Such was the object disclosed by the testimony. It is said the claim to be maintained was false; but it is never made a question on substituting bail whether the defence be well or ill founded. The party merely shows by his affidavit that, according to the advice of counsel, the mainpernor is material to him, as a witness; and though the defence may fail, the new mainpernor is holden to all the consequences. Indeed, the application supposes that the defence may fail. Otherwise, why exact new bail? It is said that bail is for the benefit of the plaintiff. True it is in itself so; but not where bail is substituted in order to let in a witness against the plaintiff. There the very object is to maintain the defence against him. It cannot be that what the court will itself sanction of record is to be deemed illegal when done *in pais*. It is but a difference of form. Accordingly, in *Brandigee v. Hale*, 13 Johns. R. 125, the attorney for the plaintiff being interested as having commenced the suit for a non-resident without procuring a bond for the costs pursuant to a rule of this court, a bond with sufficient sureties was offered to the defendant at the trial, conditioned to pay the costs. He refused to accept it; and yet this court held it to be a discharge of the attorney's interest, on the bond being filed with the clerk. The suit was

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thus maintained against the defendant by a voluntary bond *in pais* with the assent of the court. It is now the constant practice for a judge at the circuit to take substituted bail, or allow the deposit of a sum of money, and strike the name of the former mainpernors out of the bail piece, on a bare suggestion of counsel that they are material witnesses. *Pearcy v. Heming*, 5 Carr. & Payne, 503. *Bailey v. Hole*, 3 Carr. & Payne, 560. 1 Mood. & Malk. 589, S. C. *Leggett v. Boyd*, 3 Wendell, 376. *Tompkins v. Curtis*, 3 Cowen's R. 251. *M'Culloch v. Tyson*, 2 Hawks, 336. *Irwin v. Cargell*, 8 Johns. R. 407. *Stimmel v. Underwood*, 3 Gill & Johns. 282. *Butler v. De Hart*, 1 Mart. Lou. R. N. S. 184, 5, 6.

I pass over the practice of restoring competency by release as too common to need a support by cases. That *Arnet* had released his interest to the plaintiffs below in *Bell v. Smith* would not, so far as it went, have been questioned as a mode perfectly lawful. And yet this is many times to give up an important claim by the witness, as a residuary legatee or otherwise, for a nominal consideration, and the direct purpose of maintaining the suit. He is at the time a *cestui que trust* a party suing, as *Arnet* was, through his trustee; yet no one would question his right to come in on parting with his interest. What is the difference in principle between parting with an interest in that form and making an assignment as *Arnet* did? That very mode was resorted to in *Soulden v. Van Rensselaer*, 9 Wendell, 293, by the owner of the chose in action under whose direction the suit was brought, after he had been released by the attorney for the plaintiff on record. That would have been the precise case of *Arnet*, had his attorney released him. He had been discharged from his liability to indemnify the nominal plaintiffs, and it was not much insisted that he stood liable to the defendant for his costs. That was deemed a more serious difficulty in *Soulden v. Van Rensselaer*. The court got over it on the reason assigned by Mr. Justice Nelson, that *Smith*, another *cestui que trust*, to whom the witness had assigned, was liable in the first instance; and that the court would subject the witness only in

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the event of Smith's proving insolvent. The liability was, therefore, contingent. The assignment of a chose in action is perfectly innocent in itself, as innocent as giving bail; nor can we perceive how it is to be made obnoxious any more than giving bail, to the imputation of unlawful maintenance because it has in view the restoration of competency. If the purpose be nothing more, it is rather laudable, as subserving the ends of justice by furnishing additional means for disclosing the truth. We do not perceive, then, why the machinery resorted to in *Bell v. Smith*, which in its parts would be perfectly lawful, could be deemed less so when presented in a state of combination. That case is easily sustainable on the assumption of the judges that *Arnet* was still liable with his co-assured to the plaintiffs' attorney; and it appears to us that by adopting the ground taken by Mr. Justice Bayley we should be overruling almost every case which allows the restoration of competency by the voluntary act of a third person. If the objection in that case resided in the fact that *Lachlan & Robertson* were to receive a consideration for joining in the arrangement to restore the competency of the witness, and so the act was of the nature of champerty, then the objection does not apply to the case at bar. The defendant, for aught that appears, was a volunteer in giving the covenant. But such an objection, if true, would be incompatible with that class of cases where a man interested in a fund has been allowed to receive a sum of money, and release or assign his interest with a view to render him competent as a witness to increase the fund. A stockholder may become a witness for a bank on assigning his interest. *Bank of Utica v. Smalley*, 2 Cowen, 770. See also *Stall v. Catskill Bank*, 18 Wendell, 466. Surely it can be no objection that he assigns for a full price, or even more than the stock is worth. Such a circumstance would rather be evidence in favor of the assignment being *bona fide*.

In the case of *Lake v. Auburn*, 17 Wendell, 18, a witness had retained the attorney for the plaintiff, and owned the note on which the suit was brought, and an hour or two before he was sworn as a witness, and for the purpose of removing his interest

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he assigned the note to one Smith, who gave him a bond of indemnity against all costs and charges in the suit. This court held the witness to be competent for the plaintiff, inasmuch as his interest was neutralized by the bond of indemnity. And see *Chaffee v. Thomas*, 7 Cowen, 358. The case of *Lake v. Auburn* was certainly open to every objection which can be raised in the principal case, and more, on the score of maintenance. Yet that was neither mentioned by counsel nor thought of by the court. There was a valuable consideration for the indemnity, an assignment of a chose in action. Indeed the remarks of Mr. Justice Bayley, when applied to exclude the assignment of choses in action, releases, indemnities and other contrivances which the law has introduced to restore the competency of witnesses, labor against an irresistible line of authority. The law is familiar with expedients for letting in the witness, and substituting objections of credibility for those of competency, and it allows, for that purpose, full effect to the ordinary machinery of legal transactions. A guaranty in the possession of counsel, delivered by him to the guarantor for the purpose of being destroyed, and with design to render him competent, shall have that effect. *The Merchants' Bank v. Spicer*, 6 Wendell, 443. A release by one of two jointly interested in a claim either for a tort or on contract, will take away the interest of the releasee for the same purpose. *Whitmore v. Waterhouse*, 4 Carr. & Payne, 383. *Hockless v. Mitchell*, 4 Esp. R. 86. *Bulkley v. Dayton*, 14 Johns. R. 387. A legatee having assigned his interest to another who gave a bond to pay the consideration, was held competent to prove the will, *M'Iroy v. M'Iroy*, 1 Rawle, 433; and in Pennsylvania, even a party plaintiff may be made a witness on assigning, the assignee paying the costs; and in one case this was held of a claim for a trespass *de bonis asportatis*. *North v. Turner*, 9 Serg. & Rawle, 244. Many like cases could be cited. *Vide Bagley v. Osborn*, 2 Wendell, 527.

The great principle on which the doctrine of illegal maintenance rests, is, that by allowing the power to let in third persons as parties or privies to the suit, strong men may be introduced

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who will exercise an undue influence over the litigation. But this does not seem to have been at all regarded where the object was to restore competency. The introduction of new bail, and the assignment of an interest, equally open the door to such a consequence. Every method which can be imagined is also obnoxious to the objection that it is colorable, collusive or fraudulent; but courts must satisfy themselves by the best means in their power, that the mode resorted to for the transfer, extinguishment or balancing of interest is adopted in good faith; or that, at least, the object is technically effected. *Utica Ins. Co. v. Cadwell*, 3 *Wendell*, 296. And see what was said by Tilghman, C. J. and Yeates, J. in *Steele v. The Phoenix Ins. Co.*, 3 *Binn.* 313, 316, 317.

This view of the question renders it unnecessary to pronounce definitely upon the proposition strenuously contended for in argument, that, besides champerty in contracts concerning pretended titles, and a conspiracy to move and maintain suits, retained by the Revised Statutes, 2 *R. S.* 576, § 6, and *id.* 577, § 8, *sub.* 3, 2d *ed.*, we have no such thing as maintenance remaining in our law. The revisers, on introducing the new statute certainly proposed the abolition of the law of maintenance, with the exceptions mentioned, 3 *R. S.* 2d *ed.* 828, *note to* § 8, 9; and in furtherance of that object the statute of 1801, 1 *R. L. of* 1813, 172 to 174, which embodied the old English law of maintenance, is expressly repealed. 3 *R. S.* 151, 2d *ed.* *pl.* 62. The policy of the old law, so far as its main principle was concerned—*danger* from the influence of strong men—had already been much questioned by several of our judges, as inapplicable to our social condition. *Kent, Ch. in Thallhimer v. Brinckerhoff*, 3 *Cowen*, 644. *Marcy, J. in Campbell v. Jones*, 4 *Wendell*, 310. It is evident from their remarks, that the ancient provisions both of the common and statute law were regarded as in great part obsolete in this state; and, in the argument of a late case in England, with all the watchful jealousy of the feudal age, its reported cases and statutes still claiming ascendancy in the tomes of Westminster Hall, unrepealed and unimpaired, an eminent serjeant (Mr. Wilde)

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was listened to with attention by the common pleas, in an argument based upon similar strictures of English judges, with the legal writers and precedents of the realm, that hardly a vestige even of champerty remained there. *Stanly v. Jones*, 5 *Moor. & Payne*, 193. 7 *Bing.* 369, S. C. Mr. Serjeant Russel referred to the remarks of Bayley and Holroyd, Js. in *Bell v. Smith*, and this, it seems, was the only modern judicial authority he could find, to prove that the doctrine had not gone into almost total desuetude. Tindal, C. J. shewed, as the counsel for the defendant has done more at large in the case at bar, that the doctrine is not absolutely unknown even in the court of chancery. It is remarkable that both *Stanley v. Jones* and the case cited by Tindal, C. from chancery, *Stevens v. Bagwell*, 15 *Ves.* 139, 156, were neither of them much more than simple assignments of choses in action. Yet because in one case there was an agreement by the assignee to exert his influence in obtaining testimony to support the claim, and in the other an agreement to carry on the suit, they were both pronounced cases of champerty. Either office, at least with us, would be deemed the legitimate business of the assignee as implied from the nature of the assignment. If the decision in *Stanley v. Jones* could be sustained under the English notion of the right created by the assignment of a chose in action, I should suppose it could only be on the feature mentioned by the chief justice, that the assignee was to be paid out of the claim, an amount in proportion to the effect to be produced by the evidence he should procure, in enlarging the sum to be recovered. Such a motive, it was said, might lead to improper practices, 5 *Moor. & Payne*, 207; and yet it is obvious that the same motive always exists in every claimant who goes to law for his demand, whether it arise originally in his own right or that of his assignor.

But be the English law as it may; with us, at least, I should apprehend it would now be very difficult to say there can be a case of maintenance beyond the purview of our new Revised Statutes. Indeed the contrary was not very strenuously insisted upon in the argument of the principal case. Our attention was called to the evidence, as possibly furnishing ground for saying that the

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defendant's covenant was the result of a conspiracy to maintain a false claim by Mr. Feeter, and Mott, the plaintiff. In regard to that, we have only to repeat what we said at New-York, where the case was called upon the calendar as frivolous: "there is no color for the allegation." The defendant came in under the hope which actuated Mott's counsel, that Mr. Feeter's testimony would support the claim. I held the circuit, and presided at the trial wherein Mr. Feeter was first introduced as a witness; and had all the circumstances been then disclosed, I could not have hesitated to say that every part of the transaction was beyond the suspicion of any thing illegal or dishonorable.

A new trial must be denied.\*

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## BENNETT vs. LOCKWOOD &amp; CARTER.

*Damages* are recoverable by a bailor for time spent and expenses incurred in searching for property *wrongfully* taken from the possession of a bailee, if the same be duly claimed in the declaration.

ERROR from the Oswego common pleas. Lockwood and Carter sued Bennett in a justice's court, and declared in an action on the case, for taking a horse and wagon belonging to the plaintiffs from the possession of one Crippen, to whom the same had been let, and using the horse and wagon. The plaintiffs alleged, by way of *special damage*, that they had been subjected to expenses in searching for their property. The plaintiffs obtained in the justice's court a verdict for \$32, and on appeal to the Oswego C. P. a verdict was rendered in their favor for \$53. The plaintiffs proved that four days were spent by them in search of their property: this evidence was objected to, but admitted by the court, and the defendant excepted. The court charged the jury that the plaintiffs were entitled to recover for the taking of

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\* See the case of *Benedict v. Hecox*, decided in the supreme court, and affirmed in the court for the correction of errors, 18 Wendell, 490.



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the property by the defendant, and also for time spent and expenses incurred in searching for the property. The defendant excepted to the charge, and sued out a writ of error.

*O. H. Whitney*, for plaintiff in error.

*A. P. Grant & W. F. Allen*, for the defendants in error.

*By the Court*, NELSON, Ch. J. The defendant took the horse and wagon of the plaintiffs wrongfully, and used them, by reason of which taking the plaintiffs were induced to believe that the person to whom they had hired it temporarily had absconded, and therefore they went in pursuit of their property, and expended time and money. It is insisted for the plaintiff in error that the common pleas erred in allowing the plaintiffs to recover for the time spent and expenses incurred, on the ground that the damages thus claimed were not the *natural* or *necessary* consequence of the wrongful taking. Admitting the counsel for the plaintiff to be right in this proposition, it is no objection to the recovery if the damages ~~in~~ were *proximate* and not too remote, and were claimed in the declaration. 1 *Chitty's R.* 333. 1 *Saund. Pl. and Ev.* 136. Here the damages were duly claimed; they occurred in the use of reasonable means on the part of the plaintiffs to re-possess themselves of their property, and were occasioned by the wrongful act of the defendant.

Judgment affirmed.

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## HASTINGS vs. PALMER.

A party holding the *affirmative* of an issue is bound to introduce in the *first instance all the evidence on his side*, except what operates merely to answer or qualify the case as sought to be established by his adversary, at which alone the evidence in reply must be pointed; from this rule, however, departures may be made in the discretion of the presiding judge.

Where in an action of *slander* the plaintiff alleges *special damage* in consequence of reports of the existence of facts such as are alleged to have been imputed to the plaintiff by the defendant, to entitle him to give evidence of such special damage, the plaintiff is bound to prove that it was the consequence of the defendant's slander.

THIS was an action of *slander*, tried at the Oneida circuit, before the Hon. HIRAM DENIO, then one of the circuit judges.

This suit was brought for words spoken by the defendant, charging the plaintiff with *an assault with intent to kill* the defendant or one Ira Lusk. One of the counts charged the words to have been, that the plaintiff had been guilty of an assault upon the defendant or Lusk with a loaded pistol, without imputing the intent to kill; and in this count the plaintiff alleged *special damage*. The defendant pleaded the general issue, and gave notice of justification. The words laid in the declaration having been proved to have been spoken, the plaintiff called a witness of the name of *Chappell*, and offered to prove by him that he forbore to employ the plaintiff as an attorney and counsellor at law in the transaction of certain business, in consequence of hearing it reported that the plaintiff had drawn a pistol upon some one in the manner stated by the defendant; but the plaintiff did not offer to trace the report to the defendant: which evidence being objected to, was excluded. The plaintiff having rested, the defendant produced testimony in support of his notice of justification, and on his resting, the plaintiff offered to prove in *aggravation of damages*, a repetition by the defendant since the commencement of this suit, of the charges contained in the declaration: which evidence being objected to, was re-

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jected by the judge. The jury found for the *defendant*, and the plaintiff moves for a new trial. .

*H. P. Hastings*, in pro. per.

*W. C. Noyes*, for the defendant.

*By the Court*, COWEN, J. The proof of special damage was properly rejected. The report which influenced Chappell might as well have been imputed to any other of his neighbors, as to the defendant. To make the offer of evidence complete, it should have been proposed to show in some way that the special injury arose not only from the words in question, but was a consequence of the defendant's use of them.

The judge also had a right, in his discretion, to disallow the evidence offered in aggravation of damages, at so late a stage of the cause. Strictly, the plaintiff, or party holding the affirmative, is bound, in the first instance, to introduce all the evidence on his side, except that which operates merely to answer or qualify the case as it is sought to be made out by his adversary's proof. At this alone, the evidence in reply must be pointed. The following cases show that to be the settled practice at the English nisi prius, with the power of the judge to qualify it in his discretion. *Whittingham v. Bloxham*, 4 Carr. & Payne, 597. *Giles v. Powell*, 2d id. 259. *George v. Radford*, 3 id. 464. *Brown v. Giles*, 1 id. 118. *Rex v. Stimpson*, 2 id. 415. *Knapp v. Hascall*, 4 id. 590. *Rowe v. Brenton*, 3 Man. & Ryl. 133, 139, 304, on different days of a trial at bar. *Rex v. Hilditch*, 5 Carr. & Payne, 299; and see *Rex v. Findon*, 6 id. 317. The rule with its reasons and qualifications, is very well stated by Mr. Justice Mills, in *Braydon v. Goulman*, 1 Monroe, 115, 117, 118, on error brought for improperly receiving supplemental evidence of damages: "In strict practice, he who has the affirmative, ought to introduce all the evidence to make out his side of the issue; then the evidence of the negative side is heard; and finally, the rebutting proof of the affirmative, which closes the investigation. An adherence to this rule generally,

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will be found necessary in all courts of original jurisdiction; and without it confusion, loss of time, and captious and irritable conduct must follow. We say *generally*; for it will often be found proper, for good reasons, to depart from it, in order to attain complete justice; and when this ought or ought not to be done, must, in a great measure, be left to the sound discretion and prudence of the court."

NINE other grounds are taken for a new trial, *eight* of which are objections to the charge of the judge, and the *ninth*, that the verdict is against law and evidence. We think the charge was right, and the verdict was not against either law or evidence.

New trial denied.

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 GROVER vs. GOULD & FRINK.
 

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*In declaring in a court of limited and special jurisdiction (e. g. the mayor's court of the city of Rochester,) the consideration as well as the promise in an action of assumpsit, must be averred to have been within the jurisdiction of the court, or the declaration will be held bad on error brought.*

*Where, however, the indebtedness for goods sold and delivered, is laid to be at the first ward, in the city, &c., and within the jurisdiction of the court, the declaration after verdict will be held good; but it seems, on special demurrer, it would not be sustained.*

ERROR from the mayor's court of the city of Rochester. Gould and Frink brought an action of assumpsit in the mayor's court of the city of Rochester against Grover, and declared that "for that whereas the said defendant on, &c. *at the first ward in the city of Rochester, in the county of Monroe, and within the jurisdiction of this court,* was indebted to the said plaintiffs in the sum of \$249, of lawful money, &c., for divers goods, wares and merchandizes by the said plaintiffs before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant; and being so indebted to the said plaintiffs, the said defendant in consideration thereof, afterwards

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to wit, on the same day and year and *at the place aforesaid*, undertook, &c." Next followed a *quantum valebat*, in the usual form, laying the *promise* "on the same day and year, and *at the place aforesaid*." Then a count for work and labor, and materials found, laying the *indebtedness* "on the same day and year and *at the place aforesaid*." After which followed the *money counts*, laying the indebtedness as in the last count. The plaintiffs obtained a verdict, on which judgment was rendered, and the defendant sued out a writ of error.

*E. Darwin Smith*, for plaintiff in error. The mayor's court of Rochester is an inferior court of limited and special jurisdiction, having cognizance only of actions *arising within the city*, of actions against persons who shall have been *inhabitants* for six months before suit brought, and of actions for penalties in the name of the mayor and common council. *Stat. Sess. of 1834, p. 333, § 1.* The error relied on is, that it does not appear by the declaration that the cause of action arose within the city of Rochester, or that the defendant had been an inhabitant for six months before the commencement of the suit. The plaintiffs should have alleged that *the goods were sold*, that *the work was done* and *the money had and received*, &c., within the jurisdiction of the court, as well as that the *promise* was made there. 1 *Chitty's Pl.* 250. 1 *T. R.* 152. 2 *Wilson*, 16. 2 *Ld. Raym.* 1310. 1 *Saund.* 73, n. 1. Nothing is to be *intended* within the jurisdiction of an inferior court, the proceedings must show jurisdiction. 1 *Saund.* 74, b, n. 1. 1 *Bacon's Ab.* 562. 6 *T. R.* 245. 5 *Cranch*, 173, 184.

*C. M. Lee.* The *jurisdiction* being sufficiently averred in the first count, it was unnecessary to make a repetition of the same matter in the subsequent counts, all of which refer to the first; if, however, the subsequent counts are held defective, the court will permit an amendment on payment of costs.

*By the Court*, NELSON, Ch. J. This being an action brought before an inferior court, there can be no doubt of the rule, that in all such cases it is necessary that every part of that which

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constitutes the gist and substance, in other words, the cause of the action, should appear upon the record to be within the jurisdiction of the court ; therefore, as it is said, the *consideration* as well as the *promise* itself, must be laid in the declaration to be within the jurisdiction of the court, and the omission is error even after verdict. *Stauman v. Davis*, 1 *Salk.* 404, and note. 2 *Ld. Raym.* 795, *S. C.* 2 *Wilson*, 16. 1 *T. R.* 151. *Peacock v. Bell & Kendall*, 1 *Saund.* 74, and note (1)

Here the plaintiffs have averred that the defendant on the 1st December, &c. *at the first ward in the city of Rochester, &c. and within the jurisdiction of this court*, was indebted to the plaintiff, &c. for divers goods, wares and merchandizes by the said plaintiff before that time sold and delivered to the said defendant, &c., and that he then and there promised, &c. I admit that the *sale and delivery* of the goods constitute the gist of the action, the *promise* arising by operation of law ; and yet, notwithstanding the literal strictness of some of the cases which has been a subject of regret, I cannot but think that it appears with reasonable certainty that the sale and delivery took place within the jurisdiction of the court. The declaration would probably have been bad on special demurrer, but after verdict, it should be deemed sufficiently explicit : the place to be regarded as relating to the *sale and delivery* as well as to the *indebtedness*. It is neither a violation of grammar nor of sound construction of the language in the connexion used, so to understand it. An ambiguous expression in a declaration is cured by verdict, and must afterwards be taken to have been used in that sense which will sustain the verdict. 1 *Barn. & Cres.* 296. Our statute of amendments is somewhat broader than the English, and many technicalities necessarily regarded in England are here to be overlooked ; though I admit, that if we were bound to construe the declaration, as having omitted altogether the averment of jurisdiction, the defect would not be cured by the verdict. But the statute affords very strong evidence of the liberal spirit with which pleadings are to be regarded by the courts after trial.

Judgment affirmed.

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Kennedy v. Wood.

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## KENNEDY and others vs. WOOD &amp; SMITH.

Where a *naturalized citizen* died in 1833, seized of real estate, the title to which he acquired in 1824, under a *contract of purchase* made in 1810, of which real estate he had been in possession ever since, and an action of ejectment was brought by a brother and two sisters of the deceased who were *aliens at the time of his death*, and who had not complied with the requirements of the act relative to aliens passed in 1825: IT WAS HELD that the plaintiffs by reason of their *alienage* were incapable of inheriting the estate of their deceased brother, although they had been *residents of this state* since 1805.

It was further held, that the plaintiffs could not claim any thing under the *equitable estate* in the premises existing in the deceased previous to his obtaining the legal title; the acts on this subject recognizing only *legal estates*.

Whatever rights the plaintiffs had (if any) under the acts of 1802 and 1808, were destroyed by the act of 1825, which applies as well to *aliens* who had before its passage come to reside here, as to those who should subsequently arrive.

THIS was an action of *ejectment*, tried at the Monroe circuit in October, 1836, before the Hon. ADDISON GARDINER, then one of the circuit judges.

The plaintiffs claimed to recover *three undivided fifths* of about 49 acres of land, as heirs at law of *James Kennedy*, who being an *alien* came to reside in this state in the year 1802. In 1810 he entered into a contract with *Daniel Penfield* for the purchase of the premises in question, Penfield then being the owner of the same. Penfield conveyed the premises subject to the contract to *Henry Champion*, who on receiving the purchase money, conveyed the premises in 1824, to Kennedy, who had been in possession of the land since the making of the contract in 1810, and remained in possession until his death which happened in 1833. Kennedy was *naturalized* in 1810. He died without issue, and without father or mother living; but he left *three* brothers, *two* sisters and a *nephew* and *niece*, the children of a brother who died in 1822. This action is brought by Alexander Kennedy, and by Jane Morrison and Betsey Sheldon, a brother and sisters of James Kennedy, the person last seized;

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Jane and Betsey are married women, and their husbands join in the action. The plaintiffs being *aliens* came to reside in this state in 1806, and have continued here ever since. Alexandre<sup>x</sup> was *naturalized* in 1834, after the death of James; the other plaintiffs have not been naturalized or taken any measures for that purpose. The jury under the charge of the judge found a verdict for the *plaintiffs* which the defendants move to set aside.

C. A. Mann, for the defendants.

H. Denio, for the plaintiffs.

*By the Court, COWEN, J.* If James Kennedy took as an alien under the act of 1808, 3 R. S. 344, 1st ed., in connection with the act of March 26, 1802, *id.* p. 343, § 1, and the act of 1808 has continued unrepealed, in respect to these plaintiffs it is not denied that they are entitled to recover.

It is contended that the contract of purchase raised an equitable estate descendible, in 1810, (before the naturalization,) to which the subsequent deed of 1824 related. That is denied; but if the doctrine of relation might have availed, it is contended that the plaintiffs continuing aliens, they were not entitled to inherit without complying with the requisites of the statute of 1825. *Stat. Sess. of 1825, p. 427, re-enacted, 1 R. S. 720, 1st ed.*

By the act of March 6, 1802, 3 R. S. 1st ed., 343, § 1, in connection with the continuing and enlarging act of April 8, 1808, *id.* 344, 5, aliens were enabled to purchase lands, and hold and transmit such lands to their alien heirs, provided they had respectively become inhabitants of this state previous to or at the close of the legislative session of the latter year. These acts continued in force until the act of April 21, 1825, and the corresponding provisions of the Revised Statutes, *Stat. Sess. of 1825, p. 427, 1 R. S. 720, 1st ed.*, which provided that no alien who *had become* or *should thereafter become an inhabitant*, should take or hold real estate unless he should first make a deposition, as required by



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**Kennedy v. Wood.**

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the act, that he was a resident, and intended always to reside in the United States, and to become a naturalized citizen, and had taken the incipient steps for naturalization. Subject to these provisions, the statute enacted that aliens *might take and hold* any real estate of any kind whatsoever to them, their heirs and assigns forever. The act of 1802, provided that *all purchases by aliens should be deemed valid to vest the estate to them granted*. This is the provision continued by the subsequent acts, within which every conventional purchaser must come. *James Kennedy* and the plaintiffs are within these statutes in respect to *inhabitan-  
tancy*; but the former is without them in several other respects. *First*, the acts contemplate a purchase by *grant or transmission of title*, so as to create a legal estate, and not a mere executory contract to purchase, which creates at most, but an equitable estate. *Secondly*, if this were not so, he became a naturalized citizen in 1810, and, from that time, held as such, whatever his estate might be, whether equitable or legal. *Spratt's Lessee v. Spratt*, 1 Pet. 343. *Thirdly*, as a naturalized citizen, he, in 1824, took a deed from Champion, by which the former contract was satisfied and extinguished; thus, he took and, at the time of his death, held a vested estate as a naturalized citizen. He took previous to the act of 1825, and held till his death in 1833, when clearly, if the plaintiffs were entitled to inherit at all, it was because they had complied with the conditions of the act of 1825, and the Revised Statutes. This is not pretended. They all continued mere alien residents, without either of them having ever made the deposition, or taken the incipient steps required by this act. They are disqualified by its very words; and there is no color for the suggestion that they had acquired such vested rights under the former statutes as were intangible by the subsequent one. Certainly they had nothing more than a contingent right of descent, like a kinsman who might inherit at the common law. It was never doubted that the legislature had power to alter or abolish the law of descents, even the statute *de donis*, which has been repealed in this state, and I presume, by nearly every other

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state in the union. It was said by the counsel for the plaintiffs, that the statute of 1825 was not intended to affect aliens who had settled and continued here under the old statutes. Looking at the whole of the act, I take the contrary to be quite clear. The first section shows that the legislature had *former* as well as *future* residents in their minds. They say any aliens *who have come, &c., or may hereafter come, &c., may take, &c.,* provided that *no alien* shall be capable, &c. unless he shall first take the qualifying steps. Then in subsequent sections certain duties are imposed on aliens *within the act*, and forfeitures provided, from which aliens who took under the former statutes were exempt. I have no doubt the statute intended to place all alien residents on the same footing, without any distinction arising from the time at which they immigrated and settled. The re-enactment in the Revised Statutes is to the like effect.

The difficulty is, in short, not that James Kennedy, was incapable of taking and transmitting by descent, but that the plaintiffs were incapable of inheriting at the time of his death, by reason of having omitted to comply with the conditions imposed by the act of 1825.

A new trial must therefore be granted ; the costs to abide the event.

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Boughton v. Bruce.

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## BOUGHTON vs. BRUCE.

The mere making out of a writ and obtaining a *special deputation* from the sheriff, is not the commencement of a suit ; until delivery to the *special deputy*, the suit is not commenced.

Where notes are delivered as collateral security for the payment of another note made upon an *usurious agreement*, the party depositing the notes may repudiate the agreement under which they were delivered, and bring an action of replevin for their recovery ; but there must be a *demand* before suit.

ERROR from the New-York common pleas. Boughton sued Bruce in an action of *replevin* in the *detinet*, for three promissory notes delivered to the defendant as collateral security for the payment of another note made by the plaintiff to the defendant on an usurious agreement. The plaintiff proved a *demand* of the notes for which the action was brought, and a *refusal* by the defendant to deliver them up. It appeared that previous to the demand, the plaintiff had procured a *special deputation* to the person who served the writ, who went with him to witness the demand, and *after the demand and refusal, the writ was delivered to the special deputy*, who then served it. The counsel for the defendant insisted that the demand was made *after* the suit was commenced, which he insisted must be deemed to have been commenced *when the writ was delivered to the sheriff*, and when he endorsed the deputation. The court sustained the objection, and *nonsuited* the plaintiff, who sued out a writ of error.

*H. P. Hastings*, for the plaintiff in error, insisted that no demand was necessary ; that the taking of the notes being in violation of the statute against usury, was *wrongful* ; and that a demand is necessary only where the party came *lawfully* into the possession of the property. But, secondly, he contended that the demand made, was previous to the commencement of the suit, the writ not being delivered *to the deputy* until after the demand.

*H. E. Davies*, for the defendant in error.

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Boughton v. Bruce.

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*By the Court, NELSON, Ch. J.* The only material question in this case is, whether the *demand* was made before the suit was commenced. The writ was made out, and a special deputation procured from the sheriff, and then retained by the plaintiff until after the demand and refusal, when it was put into the hands of the *special deputy*, with directions to serve it. It is contended by the defendant, that the sheriff could not have legally constituted a *special deputy*, unless the writ had been put into his hands for execution. If he could, it is clear enough that the plaintiff did not intend the issuing of it *in fact* until after the demand. Unless, therefore, the commencement of the suit is a legal inference from the facts, the nonsuit was erroneous.

The statute, 1 R. S. 379, § 73, provides that every sheriff may appoint as many deputies as he thinks proper, "and persons may also be deputed by any sheriff or under-sheriff, by an instrument in writing, *to do particular acts.*" The sheriff possessed this power at the common law. 6 *Bacon's Abr. tit. Sheriff, H.* I perceive nothing in the statute or in the nature of the power which should confine the execution of it to a period of time *after* the writ was issued and in force, or any reasonable objection to the deputation before it is issued, provided the act to be done be defined with sufficient particularity. The authority to constitute a *general deputy*, includes necessarily the power of creating a *special deputy*, and to the extent delegated the power would seem to be the same. It cannot be that all control over the writ passes from the party on procuring the *special deputation*, or that he may not afterwards issue it, or omit to do so, at his discretion.

I entertain no doubt that a *demand* was necessary to enable the plaintiff to sustain the suit. The possession of the notes by the defendant was not unlawful or tortious, because they were delivered by the plaintiff himself. As it was lawful for him to deliver the notes, it surely was so for the defendant to receive them. True, the agreement under which they were delivered was not binding, and hence the plaintiff had the right to repudiate it; but this did not render the acts done under the agreement *tortious*.

Judgment reversed; *venire de novo*.

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Hart v. Dubois.

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## HART vs. DUBOIS.

An order of a court of common pleas for the discharge from custody of an imprisoned debtor who had made a voluntary assignment, is a defence to the sheriff in an action for the escape of the prisoner, although *fourteen days* had not elapsed between the arrest of the prisoner and the granting of the order; for the protection of the sheriff, it will be intended that the plaintiff *waived* full notice. *It seems* that officers acting under process *regular on its face*, are not affected by *irregularities* in the process, unless *actual participators* in the irregularity.

THIS was an action of *debt* against the defendant, as sheriff of the county of Ulster, for the escape of a prisoner from execution, tried at the Ulster circuit in October, 1836, before the Hon. CHARLES H. RUGGLES, one of the circuit judges.

The defence was, that the court of common pleas of the county of Ulster had made an order for the discharge of the prisoner from custody, upon his petition and compliance with the requirements of the statute relative to *voluntary assignments by a debtor imprisoned in execution in civil causes*, 2 R. S. 31, and that on being served with such order, the sheriff permitted him to go at large. The order for the discharge was granted on the 14th March, 1831. Only five days preceding the order, viz. on the 9th day of March, the *capias ad satisfaciendum*, from custody under which the escape was alleged to have taken place, was delivered to the under-sheriff of the county, the defendant in the process being then a prisoner within the walls of the common jail. Notice of the intention to present the petition was served upon the attorney of the plaintiff in the process, and the evidence of the service was an admission endorsed on the notice in these words: "I admit service of a copy of the within this day, March 14th, 1831." Signed by the plaintiff's attorney. The statute, section 3, requires that *fourteen days* previous notice of the presenting of the petition shall be given. It was insisted by the counsel for the plaintiff, that inasmuch as the sheriff knew that *fourteen days notice* could not have been

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Hart v. Dubois.

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given, he was aware that the common pleas had no *authority* to grant the order, and that the same must have been *irregularly* granted; and possessing this knowledge, the order of the common pleas was no protection to him. The judge ruled that the order was a good defence, and instructed the jury to find a verdict for the defendant, which they did accordingly. The plaintiff having excepted to the decision of the judge, applied for a new trial.

*H. M. Romeyn*, for the plaintiff.

*M. T. Reynolds*, for the defendant.

*By the Court*, COWEN, J. I think it does not follow, of necessity, either that the court wanted jurisdiction, or if they did, that the sheriff had knowledge thereof. The court had jurisdiction of the subject matter. Leonard was in on a ca. sa. in assumpsit for less than \$500, which entitled him to his discharge instantly, on giving the plaintiff, Hart, fourteen days' notice. 2 R. S. 31, § 1, 3. This notice was entirely for the plaintiff's benefit, and he might, therefore, waive or take short notice by consent. That would make the proceeding regular in respect to every body. *Non constat* but that he actually gave such consent: and if he did not, *non constat* that the sheriff knew he had not. I think we should intend every requisite circumstance to make the proceeding good in favor of the sheriff, inasmuch as the order of discharge was perfectly regular on its face. Of itself, it is not denied to have been a complete protection, and see *Fullerton v. Harris*, 8 *Greenleaf*, 393.

In this view, it is not necessary to say whether actual knowledge that there was a want of jurisdiction over the person, would affect the sheriff. I am aware the authorities leave it open to contend that, in certain cases, where there is a want of jurisdiction over subject matter or territory, and that known to the officer, he is liable; and it is not necessary to deny that it may be so; nor that he might be implicated by actual participation in a notice mischievously irregular. But such a case is

*Sterling v. Welcome.*

not made out here. Independent of participation, how is he to know but the usual notice was waived as it always may be. Take the case where a justice has no jurisdiction without process served in time and duly returned; how is the officer holding an execution where no summons was served, to know that it was not waived? Short of a guilty participation, I know not how he is to be affected. Suppose an officer to be told all about the original irregularity; how is he to know that the information is true? *Olliet v. Bessey, T. Jones, 214.*

New trial denied.

*STERLING vs. WELCOME.*

Where property is taken under an attachment, the lien created thereby continues notwithstanding the giving of a bond by the debtor for its production until the issuing of an execution and a reasonable time thereafter to make a levy. If, however, in the meantime the property be removed by the debtor beyond the jurisdiction of the officer who issued the attachment, and it be there seized under another attachment, the lien is gone notwithstanding the issuing of an execution on the judgment under the first attachment.

THIS was an action of replevin noticed for trial at the Oneida circuit, in May, 1837, and submitted to the Hon. JOHN WILLARD, one of the circuit judges upon a case agreed upon by the parties setting forth the following facts: On the 12th December, 1835, *A. G. Colwell* and *L. Long*, obtained an attachment from a justice of the peace in the county of *Herkimer* against the property of one *Eara C. Lee*, which was delivered to *Ezekiel Welch*, a constable of Frankfort in the county of *Herkimer*, and who by virtue thereof levied upon two roan horses and a set of harness, the property of *Lee*. A bond pursuant to the statute was executed by *Lee*, with surety for the production of the property to satisfy any execution, &c. and the property was left in his possession. On the 21st December, 1835, the plaintiffs in the attachment duly obtained judgment. Subsequent to the above seizure *Lee* went to *Kirkland*

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Sterling v. Welcome.

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in the county of *Oneida*, and took with him the above property, which was there seized on the 15th February, 1836, under an attachment issued by a justice of the peace of the county of *Oneida* at the suit of one *A. Peters*; the seizure was made by *Welcome*, the defendant in this cause, who was a constable of *Kirkland*. On 26th February, *Peters* duly obtained a judgment, and on 28th March, an execution was issued thereon, by virtue of which *Welcome* levied upon the same property. On the 4th April, 1836, *Sterling*, the plaintiff in this cause, came to *Kirkland*, and demanded the two roan horses and harness by virtue of an execution issued by the justice in *Herkimer*, by whom the attachment was issued at the suit of *Colwell* and *Long*, upon the judgment in their favor. Upon the execution thus held by *Welcome*, the justice had endorsed that the same was issued on a judgment obtained by the plaintiffs on an attachment issued in their favor, which was levied upon a span of roan horses and a set of harness. The execution was delivered by the *Herkimer* justice to *Sterling*, a constable of *Frankfort*, in the county of *Herkimer*, and who was the successor of *Welch*, the constable who served the first attachment. *Welcome* refusing to deliver up the property, this action was brought. The circuit judge decided that the plaintiff was not entitled to maintain his suit; whereupon the case was brought before the court in the nature of a motion for a new trial.

*G. B. Judd*, for the plaintiff.

*W. M. Allen*, for the defendant.

By the Court, NELSON, Ch. J. The case of *Van Loan v. Kline*, 10 Johns. R. 129, is in point to show that the bond given by a defendant in an attachment conditioned that the goods and chattels seized, shall be produced to satisfy the execution thereafter to be issued, does not operate to discharge them from the lien under it, but that notwithstanding the bond they continue in the custody of the law. The attachment in *Van*



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*Loan v. Kline*, was issued under the act of 1808, but the provision in respect to the bond is the same as that now in force, 2 R. S. 231, § 32. The exposition of the provision given by the case referred to, is full and satisfactory, and need not be repeated. The lien continues until after judgment and execution regularly obtained with the view to secure the application of the property to the discharge of the debt ; it ceases on the execution being issued, as then the property is held by other process. But it is insisted by the counsel for the defendant, and I think correctly, that though the property be in the custody of the law under the attachment, and so continues down to the time when the execution actually is, or may be issued, still it cannot be said to be held under the process of execution until a *levy* by virtue thereof be regularly made. This undoubtedly must be so, unless we say that the seizure under the attachment shall enure to the benefit of the execution ; and this we cannot say consistently with the security of the judgment creditor, unless we go further and hold that the *bond* shall also enure in like manner, or if the property has been taken into the custody of the attaching officer, that he may continue to keep it until the day of sale, although he may not be the person to whom the execution is delivered ; for should we say that a *levy* under the execution is not essential to hold the property, it need not be removed or disturbed until the day of sale, and that might be indefinitely postponed. The better construction, I think is, that a *levy* must be made in the usual way as if no connexion existed between the process of attachment and the process of execution, and then the responsibilities under each process will be properly distributed both in respect to officers and sureties. This seems to be the view of the court of *Massachusetts* under the attachment law of that state, which as regards this question is essentially like ours, 9 *Mass. R.* 257 ; 7 *id.* 505 ; 15 *id.* 225 ; 16 *id.* 296 ; 4 *id.* 498 ; 16 *Pick.* 556.

If, as I am inclined to think, a *levy* be necessary, then it is clear that this action cannot be maintained, because a *levy* under the execution held by the plaintiff could not be made *beyond the jurisdiction* of the justice who issued that process. This conclu-

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 Atkins v. Kinnan.
 

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sion is not subject to the imputation that it violates the rule which forbids a levy upon property already in the custody of the law, because the *lien* of the attachment ceases on the issuing of the execution and the elapsing of a reasonable time thereafter to make a levy. 10 *Johas. R.* 131, and the cases above cited.

New trial denied.

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 ATKINS and wife vs. KINNAN.

ATKINS and wife and TUNISON vs. BOSTWICK.

ATKINS and wife and TUNISON vs. CAYWOOD.

A deed where a sale is had under a *surrogate's order*, omitting to set forth at large the order of sale made by the surrogate, is *inoperative* at law until confirmed by the chancellor; it need not be *literally* resited, but every substantial part of it should be set forth.

Where measures are authorized by statute in derogation of the common law by which the title to land of one is to be divested, and transferred to another, every requisite having the semblance of benefit to the former must be strictly complied with.

So where the interest of a party is to be affected by an order which is required by statute to be drawn up in a *specified form*, the requirement must be exactly pursued, or the order is void.

A *surrogate's order of sale* of real estate for the payment of debts, cannot ordinarily be impeached *collaterally* even for *fraud*; if the surrogate obtains jurisdiction by the presentment of an account of the estate and debts of the deceased, his adjudication that the personal estate is insufficient for the payment of debts, followed by an order of sale, is conclusive in any collateral proceeding.

Such adjudication is examinable only on appeal, or by a proceeding in the nature of an appeal.

It seems that an *account of debts*, stating neither the names of the creditors, the amounts due them severally, nor the consideration of indebtedness, would not confer jurisdiction upon the surrogate; nor, it seems, would funeral expenses of the deceased be a proper item of such account.

A *penalty* incurred by the deceased in a contract made by him while living, is a proper item of such account, and will be deemed due to its whole amount, either as equivalent to actual damages, or as stipulated damages.)

THE above were actions of *ejectment*, tried at the Tompkins circuit, before the Hon. ROBERT C. MONELL, one of the circuit judges.

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Atkins v. Kinnan.

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*Jane*, the wife of Atkins, and *John L. Tunison*, were the children, heirs at law and devisees of James Tunison, who died seised of a tract of 250 acres of land, situate in the now county of Tompkins, and who by his will, devised *one-third* of the tract to his daughter Jane, and the remainder to his son John L. Tunison, and appointed Ryneer Covert his executor, who proved the will, and took upon himself the execution thereof in June, 1807. The will was proved before the surrogate of *Seneca* county, within which county the premises were then situate; but on the erection of the county of *Tompkins*, they were included within the latter county. The first above action was commenced in 1834, and the others in July, 1836, and were brought for the recovery of portions of the above tract. The plaintiffs *prima facie* showed a right to recover. On the part of the defendant, it was shown that on the 12th Sept. 1809, the *surrogate* of the county of *Seneca*, on the application of the *executor* of the will of *James Tunison*, made an order for the sale of two portions of the above tract of fifty acres each, for the payment of the debts of the testator, and that the same were sold in pursuance of such order, and conveyed by the executor, to one *Philip Tunison*, and the other to *John Caywood*, by deeds bearing date in 1809 and 1813: under which deeds the defendants claimed title. It was insisted, that notwithstanding the proofs exhibited by the defendants, the plaintiffs were entitled to recover, because: 1. The *domicil* of *James Tunison*, the testator, at the time of his decease, was in the state of *New-Jersey*, and not in the county of *Seneca within this state*, and that consequently the *surrogate of Seneca* had not jurisdiction in the matter; 2. That though it should be found that the *domicil* of the testator was *within this state*, that yet the surrogate had not jurisdiction, on account of the insufficiency of the *account* and *inventory* presented to him by the *executor*, on the application for an order of sale: and 3. If it should be held that the account and inventory were unexceptionable, that yet the defendants had failed to establish a title, by reason of the *omission to set forth at large* the surrogate's order of sale in the deeds executed by the executor, in compliance with the

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*Atkins v. Kinnan.*

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requirements of the statute under which the proceedings were had. On the question of the *domicil* of the testator, the proof, which was contradictory, was submitted by the judge to the jury, with instructions that if they should find that the domicil of the testator at the time of his death was within this state, to find a verdict for the defendants; otherwise for the plaintiffs. The jury found for the defendants, and the plaintiffs now ask for a new trial. The following is a copy of the *account* and *inventory* exhibited to the surrogate :

"A just and true account of the debts owing from James Tunison at the time of his death ; and the personal estate of the said James Tunison :

"To debts owing several persons, together with his funeral charges in the state of New-Jersey,.....	\$145 00
"To debts owing sundry persons in the county of Seneca, and to expenses in proving a will, .....	6 50
"To the penalty incurred in a lease to Abraham Long-con and John Caywood, of Ulysses,.....	500 00
	<hr/> \$651 50

"Contra—Cr.

"By amount of personal estate left in	
"Ovid, .....	\$13 75
"By ditto ditto sold in	
"Jersey, .....	95 00
	<hr/> \$108 75

"Balance owing from said estate,..... \$542 75"

The *deed* from the executor to *Philip Tunison*, the purchaser of one of the portions of 50 acres, after reciting the seisin of James Tunison, the making of his will, the proof thereof before the surrogate of *Seneca*, and the assumption of its execution by the executor, proceeds as follows : "And whereas, due proof hath been made to the surrogate, pursuant to the laws in such case made and provided, that the personal estate of the said testator was insufficient to pay his debts ; and whereas, as the

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" said surrogate did, on the twelfth day of September, in the year  
" of our Lord one thousand eight hundred and nine, by his order  
" under his hand and the seal of his said office, in pursuance of  
" the statute of the state of New-York, in such case made and  
" provided, authorize, empower and direct the said Rynear (the  
" executor meaning) to sell and convey the above described fifty  
" acres (the same having been before particularly described) of  
" land, being part of lot number sixty-eight, in the town of  
" Ulysses aforesaid, and a deed of conveyance to be executed  
" therefor. Now THEREFORE, THIS INDENTURE WITNESSETH,  
" that the said Rynear Covert, by virtue of the said last will and  
" testament, and in pursuance of the order of the said surrogate,  
" and in consideration of the sum of one hundred and seventy-five  
" dollars to him in hand well and truly paid, the receipt whereof  
" is hereby confessed and acknowledged, hath granted," &c., proceeding in the usual form of a conveyance of real estate, down to the *habendum* clause, which is in these words: " To have and  
" to hold, all and singular the said fifty acres of land, &c. unto  
" the said Philip Tunison, &c., as fully, freely and absolutely as  
" he the said Rynear Covert, executor as aforesaid, might, could  
" or ought to do by virtue of the said last will and testament, and  
" in pursuance of the authority vested in him for that purpose by  
" the said surrogate." The deed to *Caywood* was more imperfect than the one just recited, in respect to setting forth the order of the surrogate. The surrogate's *order of sale* states the presenting of the petition by the executor, and sets forth the substance of it, viz: that the personal estate of the testator was insufficient for the payment of his debts, and praying the aid of the surrogate in the premises. The surrogate then proceeds by stating that he thereupon made an order for all persons interested to show cause, &c.: that the same was duly published, and that on the day appointed, he proceeded to hear and examine the proofs and allegations of the executor, and upon due proof and examination, found and adjudged that the personal estate of the testator was insufficient for the payment of his debts, and that the executor had applied such parts of the personal property as

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had come to his knowledge, towards the payment of the debts of the testator, and that there yet remained due and unpaid the sum of \$500, and the necessary costs and charges attending the application to him the surrogate, and he thereupon orders and determines that two parcels of land of fifty acres each, (particularly describing them) be sold, and that a deed of conveyance be executed therefor by the executor. Besides the questions as to the jurisdiction of the surrogate, and the setting forth of the order of sale in the deed of the executor, other questions were raised on the trial and discussed at the bar, on the motion of a new trial, which are not here noticed.

*A. Gibbs*, for the plaintiffs.

*Ben Johnson*, for the defendants.

*By the Court*, COWEN, J. After disposing of some minor questions, the judge proceeded as follows :

Thus these verdicts are brought to depend exclusively on the form of the proceedings before the surrogate, and the deeds from the executor. If these were, on their face valid, as being a compliance with the statute, 1 R. L. of 1801, p. 223, 4, § 20 and 21, the title of all the defendants was perfect, under the finding of the jury upon the question of domicile. If not, the plaintiffs are entitled to recover, unless there be other impediments which can have no operation in disposing of these cases.

By § 20 of the statutes above referred to, the executor was bound to make a *just and true account* of the personal estate *and debts*, as far as he could discover the same, and deliver it, with a proper petition, to the surrogate, who might, on due inquiry, order a sale of real estate, if he should find the personal estate insufficient to pay the debts. It was mentioned in argument that the account, when presented, was not sworn to by the executor ; but no such objection being made on the trial, it cannot be entertained here.

It is clear that we cannot, in this collateral proceeding, inquire whether, in fact, there were any debts due over and above the

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personal estate. The petition and account of the debts and estate were the papers to confer jurisdiction under the statute; *Ford v. Walsworth*, 15 *Wendell*, 449; and if they were sufficient, as showing a balance against the estate in proper form, the adjudication of the surrogate that a balance was due, followed by his order of sale, must be received as conclusive. *Jackson, ex dem. Jenkins, v. Robinson*, 4 *Wendell*, 436. Such a proceeding cannot, ordinarily, be impeached, in a collateral proceeding, even for fraud, where all persons interested are properly made parties according to the statute. The doctrine is quite familiar in examining the proceedings of all courts. *Per Sergeant J. in Winner's appeal*, 1 *Whart. R.* 105, 106. *M'Fadden v. Geddis*, 17 *Serg. & Rawle*, 336, and cases there cited. The difference lies between a want of jurisdiction and error. In the former case, the whole is *coram non judice* and void: in the latter, the proceeding can not be impugned in a collateral action, even though it be erroneous on its face, *Jackson, ex dem. M'Fail, v. Crawfords*, 12 *Wendell*, 533; and even though it relate to a fact which in a former stage of the proceeding might have been essential to confer jurisdiction. *Per Shaw, C. J. in Betts v. Bagley*, 12 *Pick.* 562. It is examinable only on a direct proceeding, as by an appeal, or a proceeding in nature of an appeal; and where there is no remedy of that kind, it concludes forever.

The whole case is then narrowed down to two of the points made by the plaintiffs' counsel: 1. Whether the account of debts and personal property filed with the surrogate were sufficient to give him jurisdiction, and 2. Whether the deed, in omitting to state his order at large, is therefore void.

The first objection was levelled particularly against the account of debts due from the estate. In all three of the causes, it was said, neither person nor amount, nor consideration are mentioned as to some of the debts, and in the action against Caywood, it was added, what in fact is equally applicable to all of them, that some of the debts arose after the testator's death. The statute 1 *R. L. of 1801*, 323, § 20, should doubtless be so construed as to facilitate the detection of fraud in simulating

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debts, thus wrongfully disinheriting heirs or divesting the claims of devisees. In that view, it may be too strong to say that a lumping of the debts throughout, as is done here in respect to part, would be a compliance with the act. It would not much resemble an account in any sense of the word. But it is not necessary to say definitively, whether that would be a fatal defect, nor whether funeral expenses are a debt of the testator within the meaning of the act; for there can be no doubt that the account of the debt of \$500 stated to have been due to Longcon & Caywood of Ulysses, by way of penalty in a lease, was sufficiently specific. This it is said must of necessity be more than the real debt, because it is stated as a penalty. That is not so. We ought to intend rather that the damages for the breach equalled the penalty, or that this was in the nature of liquidated damages. Again, if the whole penalty were wrongfully allowed, the objection does not relate to jurisdiction. The court having power to award that any balance was due from the estate, excess was *error* only, and must here, notwithstanding, be taken for the true sum. That item will, of itself, sustain the proceedings, even if we reject all the others as nullities.

2. In respect to the form of the deed; the statute, 1 *R. L. by Kent & Radcliff*, 1801, p. 324, § 21, requires that the sale shall be made and conveyances for the same executed by the executors, &c., applying for the order; "and the conveyances for the same shall set forth *such order at large*; and shall be valid, &c., against the heirs and devisees of such testator or intestate, and all claiming by, from or under them."

In strict prudence, even at common law, and independent of any statutory injunction, such a deed should recite the authority under which the executor acted; for, though such a recital would not, as against persons other than the grantor or those claiming under him, be evidence of *the order*, it would, even in respect to strangers, be proof to connect the grantor with the order, as a cotemporaneous declaration that the agent was acting as such, and not in his own right. The omission of such a re-



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cital would put the party claiming under the deed, to show the fact by proof *aliunde*, as he must in all cases against the heir or devisee prove the original order. Probably there would not, in general, be much difficulty in establishing the connexion which would be intended, on its appearing that the grantor had no pretence of title in his own right, for the law refers the intention to the lawful, rather than the wrongful capacity. *Per Holt, C. J. in Parker v. Kett*, 1 *Salk.* 95, and 1 *Ld. Raym.* 658. Yet all this, is mainly for the benefit of the grantee. What advantage the heir or devisee or creditors can derive from the recital in a deed which is to go into the hands of an adverse claimant, the recital too of an order which is matter of record, it is perhaps difficult to conceive. The deeds refer to the order, and one of them mentions its date in such a way, that any one can find it in all its relations and dependencies at the fountain head; and if we could feel ourselves warranted in the belief that no benefit whatever was intended by the recital to any except the grantee and those claiming under him, I, for one, should then have no difficulty in saying, that it is not for the plaintiffs to raise the objection. *Quilibet potest renunciare juri pro se introducto.* 2 *Inst.* 183.

But the matter has not been thus regarded by the legislature. It is true, as was said on the argument, that there is no express adjudication in this court, declaring the want of such a recital fatal to the conveyance. The farthest we have gone is in *Rea v. McEachron*, 13 *Wendell*, 465, which avoids it for actual want of the surrogate's order of confirmation. A late statute has, however, gone farther, 2 *R. S.* 2d ed. 48, § 61 to 65 inclusive. These sections provide that when the conveyance omits to set forth at large the order of the surrogate, either in case of a past or future sale, the chancellor shall make such order confirming the sale and conveyance as he shall deem equitable, on its appearance to him that the sale was made fairly and in good faith. The omission is put on the same footing in point of materiality, as if, on a sale under a previous statute, now repealed, some discreet person had not concurred in the conveyance with the

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personal representative. The statutes bearing upon this question are cited, and their material provisions noticed, by Sutherland, J. in *Rea v. M'Eachron*. I collect from them, that the legislature regard the recital in question as beneficial to the heirs, devisees or creditors; as meaning that its omission shall not be overlooked in a court of law; nor the nonreciting conveyance be made available except on investigation and an order of confirmation by the court of chancery. This is certainly right, if there could be made out a probable benefit in the recital, under any supposable circumstances, to heirs, devisees or creditors. Doubtless the legislature must have proceeded on this idea; and, if so, it is not for us to deny that they were correct. At any rate, by pronouncing the conveyance good, without the requisite being supplied by the chancellor, we should supersede his jurisdiction; and in that respect, at least, our decision would conflict with the statutory provisions. See *Ex parte Hemiup*, 2 *Peige*, 316. 3 *id.* 305. Where certain steps are authorized by statute in derogation of the common law, by which the title of one is to be divested and transferred to another, every requisite having the semblance of benefit to the former must be strictly complied with. This is abundantly exemplified in the cases upon sales for United States direct taxes. *Jackson, ex dem. Cook v. Shepard*, 7 *Cowen*, 88, and cases there cited. So where the interest of another is to be affected by an order which a statute says shall be drawn up in certain words, giving the form in a schedule, this must be exactly pursued, or the order is void *Davison v. Gill*, 1 *East*, 64. The case cited was of a proceeding by justices, to stop an old foot way and substitute a new one, the statute under which they acted requiring "that the forms of proceedings set forth in the schedule annexed, shall be used on all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case." Lord Kenyon, C. J., observed, "I cannot therefore say that these words are merely directory. Power is given to the magistrate to take away, on certain conditions, a right which the public before enjoyed; and this is to be done in a certain

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prescribed form, with such additions and variations only as the locality of the description may require. Now here there is a material variance in the order from the form prescribed; for it does not set forth the length and breadth of the new path set out in lieu of the old one." The court, therefore, held the order void; and so the public still entitled to the use of the old path through the plaintiff's land. *And see Plowd. Comm.* 206; 1 *Kent's Comm.* 466, 3d ed., note d. It is said in *Plowden*, "Every statute that limits a thing to be done in a particular form, although it be done in the affirmative, includes in itself a negative, viz. that it shall not be done otherwise." And this is clearly so of all statutes which in affirmative words appoint or limit an order or form in things which were not known to the common law. *Plowd. Comm.* 113. In the case at bar, a title was to be divested and transferred to another, in a new form, and under a naked power conferred by statute. After providing for the surrogate's order of sale, 1 *R. L.* of 1801, 323, 4, § 20, the next section says the conveyance shall set forth his *order at large*. That certainly was not done within the meaning of the statute, either in the deed to Philip Tunison or Caywood. The *order* recited all the previous proceedings: the account and petition for sale by the executor, naming him, the order to shew cause, its publication, the hearing of the proofs, the adjudication that the estate was in debt and its personal assets insufficient having been all applied; and a balance of 500 dollars beside costs yet remaining due. The order then directs the sale, defining the two parcels of 50 acres each to be taken from the 250 acres. The deed to *Philip Tunison* comes nearest a recital of this final order, and that is simply that the surrogate had by his order of such a date directed such a parcel of 50 acres to be sold, describing it as in the order. The deed to Caywood does not even refer to the date, nor recite the description. The best is a recital of the order but in part. The adjudication showing the amount due after the exhaustion of the personal assets, was important information both to the devisees and to creditors. It was in fact a part of the same order, indicating the amount

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of money to be raised by the sale; and why was not that material as well as the mere description of the land? The recital of the previous proceedings was also very well; and in practice, we believe, usually makes a part of the order of sale. The statute demanding the order at large, we cannot say it is complied with so long as the deed omits to recite the whole as it stands upon record. We do not say it should be literally recited; but it is impossible to say that a document is set forth at large unless every part is substantially presented. That we think is the least that the statute calls for. The conveyances from the executor were, therefore, void, and must continue so unless they shall be rectified on a proper application to the chancellor.

Upon the ground of the defective recital alone, new trials are granted in all three of the causes.

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## WELLS &amp; SPRING vs. EVANS and others.

A release executed by an attorney in his own name, and not in the name of his principal by himself as attorney, is not obligatory upon the principal; and parol proof is inadmissible to show an adoption of the act, by the principal receiving the consideration of the release.

It seems, however, that though the acceptance of the consideration by the principal may not be shown to give validity to the release, yet that evidence of the receipt of the money is admissible to show payment in whole or in part of the demand of the principal.

Although one partner cannot bind his copartner by seal, where the effect of the instrument thus executed is to charge the firm, yet it is competent to him, by an instrument under seal, to authorize a third person to discharge a debt due to the firm.

All the partners of a firm are bound by a note made by one of the partners in the name of the firm for his individual benefit, even though it be fraudulently put into circulation as it respects himself, if the note before maturity comes into the hands of a bona fide holder.

This was an action of *assumpsit*, tried at the New-York circuit in May, 1837, before the Hon. OGDEN EDWARDS, one of the circuit judges.

The plaintiffs are *endorsees* of a promissory note for \$3,000, made by the defendants to Samuel S. Hill, dated 27th July, 1835,

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payable twelve months after date. The defendants were partners in trade, and the note was signed in the partnership name, "Thomas Evans & Sons," by *Thomas Evans*, the senior partner. The defence set up was the following: On the 11th December, 1835, the plaintiffs united with several others, merchants of the city of New-York, in executing a *power of attorney* to Charles B. Grannis and Henry M. Mead, authorizing them to demand and receive from *Hill*, the endorser of the note in question, all sum and sums of money due, owing and payable to them, and, on receipt of the same, to execute acquittances and discharges. This power of attorney was executed by *Marcus Spring*, one of the plaintiffs, by affixing thereto his own name and the name of his firm, thus: "Marcus Spring for Wells & Spring," and adding to the signature a *seal*. This power of attorney was received in evidence, though objected to by the plaintiffs' counsel. The defendants next offered in evidence an instrument in writing, executed by Grannis & Mead, bearing date 12th December, 1835, whereby they acknowledge to have received of *Hill*, the endorser of the above note, \$9,000 *in money*; in consideration of which, they promise to surrender to *Hill*, without delay, such notes as had been given to him by different individuals *for his accommodation*, and which had been endorsed by him, *in lieu* of which, they stated they had received his individual notes; also, they promised to discontinue all suits upon such notes, and to refrain from causing any costs to be made on the same. They also stated that they were to receive, *whenever they should require the same*, all transfers of real estate made by *Hill*, and particularly a transfer made to H. Mather, "for the payment of the respective notes." This instrument was executed thus: "Cha's B. Grannis, L. s. Henry M. Mead, L. s." Its admission in evidence was objected to, and rejected by the judge. The defendants also offered in evidence the transfer to Mather, referred to in the instrument executed by Grannis & Mead. It was a *deed in trust*, executed by *Hill* to *Henry Mather*, bearing date 24th October, 1835, conveying sundry parcels of land, and was accompanied by a *declaration of trust*, executed by *Hill* and *Mather*, specifying the objects of the

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conveyance ; which were, that Mather should offer certain parcels of the property to certain specified creditors in payment of their demands ; and on their refusal to accept the same to *sell* or mortgage the property, and appropriate the proceeds to the payment of the debts. Among others, certain parcels of the property were appropriated to the payment of the *note of \$3,000 of Thomas Evans & Sons*. The defendant, in connection with those instruments, offered to prove by *parol*, that the deed from Hill to Mather was the *transfer* referred to in the instrument executed by Grannis & Mead ; that the note in controversy was an *accommodation note*, given by the defendants to Hill without consideration, and was the identical note specified in the declaration of trust ; and that *Mather* had always been ready and willing to execute to Grannis & Mead a conveyance of the real estate specified in the deed of trust, but had never been requested so to do : all which evidence was objected to by the plaintiffs, and rejected by the judge. The defendants further *offered to prove* that the instrument executed by Grannis & Mead was executed under and in pursuance of the power of attorney given to them, and *that the plaintiffs received their proportion of the \$3,000* specified in the instrument : which evidence was objected to by the plaintiffs' counsel, *so far as* the same tended to prove that the instrument executed by Grannis & Mead *was obligatory upon the plaintiffs as a release*. The objection was sustained, and the evidence rejected ; the judge, however, ruled that if the defendants desired to prove the *payment of any money* to the plaintiffs as a credit or partial payment, or that the plaintiffs *had received a conveyance of land*, or any other thing, they were at liberty to do so ; and that, for that purpose, but not for the purpose with which it was offered by the defendants, the *deed to Mather* and the *declaration of trust* were admissible in evidence. Under which decision, however, no evidence was given by the defendants. The defendants finally offered to prove that the note in question was made by *Thomas Evans*, one of the partners of the firm of *Thomas Evans & Sons*, in the name of the firm, *for his individual benefit* ; that it was made in *blank*, as it respected the

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amount, and placed in the hands of *Hill* for the purpose of borrowing money thereon, for the individual benefit of *Thomas Evans*, and that *Hill* had no authority to fill the blank, or issue the note for any other purpose; and that, in violation of the trust confided in him, he passed the note to the plaintiffs for *goods purchased of them for his own benefit*, without the knowledge, consent or approbation of the defendants, or either of them; the defendants conceded that the plaintiffs received the note from *Hill*, before its maturity, for goods sold by them to *Hill*, and that they were holders for value: which evidence was objected to by the plaintiffs, and rejected by the judge. The counsel for the defendants insisted upon the state of facts lastly offered to be proved, 1. That the note never had a legal inception or existence; and 2. That at all events, the plaintiffs could not recover without proving that *all the defendants* had assented to the making of the note *in the name of the firm*, or that it was made for the benefit of the firm, and within the scope of the partnership business. The jury, under the direction of the judge, who charged them that the plaintiffs *were entitled to recover*, found a verdict for the plaintiffs, for the amount of the note and interest. The defendants having excepted to all the decisions of the judge, except the first, and to the charge given to the jury, now moved for a new trial.

*J. A. Collier*, for defendants.

*J. S. Doworth*, for plaintiffs.

*By the court*, COWEN, J. The points made on the argument in favor of a new trial, consist of three: *first*, That the proof proposed was proper to make out a partial payment, with an accord and satisfaction for the residue of the debt due from *Hill*, the endorser of the note; or, in other words, a composition and discharge of *Hill*, for whose accommodation the defendants made the note; *secondly*, That *Thomas Evans*, one of the defendants' firm, without the knowledge or assent of his copartners, drew the note in blank, to borrow money on his own individual

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account; and that Hill, without authority, perverted it to the purpose of purchasing goods of the plaintiffs for himself. Each of these grounds aim at a total bar to the action. A *third* point insists that the evidence offered and rejected, or some part of it, was at least admissable to show payment of the note for so much of the 9,000 dollars received by the plaintiffs' attorneys as was applicable to the note in question.

The difficulty of maintaining the first ground of defence, lies in the form which Grannis and Mead, the plaintiffs' attorneys, adopted for effecting the composition. It is added, also, by the plaintiffs' counsel, that *Spring* alone could not seal the power of attorney for himself and *Wells*, so as to make it binding on both; that his act is within the principle which forbids one partner to bind another by seal. That, however, is only where *the firm is sought to be charged*; not where the object is to discharge a debt due to it. One of two joint creditors or partners may release for both; each in this respect having an interest with a power which has been likened to that of a co-executor. *Pierson v. Hooker*, 3 Johns. R. 68. *McBride v. Hagan*, 1 Wendell, 326, 334. As each may, in respect to his interest and power over the debt, give a release personally, there cannot be a doubt that he may delegate this power by seal to another. The judge, therefore, properly received the power of attorney in evidence, under the proposition to follow it up with a release or composition under it. The acts of the attorneys, however, were utterly inefficient. The instrument of December 12th, 1835, which, in the name of the plaintiffs, would have itself been a complete release, does not even allude to them. The clauses of receipt, composition and covenant, with the signatures and seals which it contains, are in the name of Grannis and Mead, without calling themselves attorneys. Taking the intended release by itself, therefore, it is merely void in respect to the plaintiffs within all the cases. The form in which attorneys must execute this kind of power, was very clearly pointed out as long ago as *Combes' case*, 9 Rep. 76, 77. The rule there laid down is, "that when any one has authority as attorney to



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do any act, he ought to do it in his name who gives the authority ; for he appoints the attorney to be in his place, and to represent his person ; and, therefore, the attorney cannot do it in his own name, nor as his proper act, but in the name and as the act of him who gave the authority." The case allows some little latitude for acts *in pais*, as where the attorney is to *surrender* or *deliver seisin*. He may then say, "I, as attorney, do the act." "But," adds the case, "if attorneys have power by writing to make leases by indenture, for years, &c. they cannot make indentures in their own names, but in the name of him who gives them warrant." The only exception there mentioned is, of a power given by will, which must of necessity be executed in the name of the attorney, because the principal is dead. This case was much considered in *Elwell v. Shaw*, 16 *Mass. R.* 42, and applied with a rigor far beyond what is necessary to shew the release in question a nullity. *Jonathan Elwell*, the demandant, executed a power of attorney to *Joshua Elwell*, to convey the premises in question. The latter conveyed by deed, reciting the power ; and proceeded : "I, the said Joshua, by virtue of the power aforesaid, in consideration, &c. do hereby bargain, &c. and convey to J. S., &c." signed "Joshua Elwell. (L. S.)" The deed was holden void. 1 *Greenl. R.* 339, *S. C.* The rule has been applied to various written contracts, both executory and executed, sealed and unsealed ; and as to bills of exchange and promissory notes, *Thomas v. Bishop*, 2 *Str.* 955 ; *Elmy v. Eye*, 15 *East*, 7 ; *Stackpole v. Arnold*, 11 *Mass. R.* 27 ; *Pentz v. Stanton*, 10 *Wendell*, 271, and the cases there cited by *Sutherland, J.* ; *Thatcher v. Dinsmore*, 5 *Mass. R.* 299 ; *Forster v. Fuller*, 6 *id.* 58 ; *Buffum v. Chadwick*, 8 *id.* 103 ; and other simple contracts, *Arfridson v. Ladd*, 12 *Mass. R.* 173 ; and a sealed bill of sale of a personal chattel, *Welsh v. Parish*, 1 *Hill's Law R.* 155. In the last case, the bill of sale ran thus : "I, Wm. Usher, jr., attorney in fact of Patrick Usher, owner of the brig Junietta, &c. grant, bargain and sell, &c." Signed "Wm. Usher, jr., attorney for Patrick Usher." (L. S.) The deed was held void after very full consideration. Mr. Justice

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Johnson cites and adopts some very pertinent remarks relative to the execution of leases by attorney, made in *Bacon's Abridgment, Leases and Terms for years*, (I.) pl. 10. These are to the effect that an attorney having no interest in the land, even his adding, "*by virtue of the letter of attorney*," will not help a lease which is made in his own name; for, as he derived no interest from the letter of attorney, he can convey none. And though an act *in pais*, done in that form may be good, yet, as in leasing, the deed alone conveys the interest, and is the very essence of the lease, it must be made in the name of the person having the interest; otherwise it is so merely void, that it will not estop even the attorney. See 4 *Bac. Abr. Phila. ed.* of 1813, p. 140, 141, *for all this matter much more at length*. These remarks apply with emphasis to the case in hand. The release does not even profess to be made by attorney; yet, for the purposes of a full defence, it must be brought to enure not only as a receipt, but as a composition deed, a covenant to give up the note and to accept real estate, &c. in respect to which it is most essential that the holder of the note should be named as the party. In *Prior v. Coulter*, cited in 1 *ELL*, 160, the principal, by letter of attorney, authorized his agent to sell a patent right for machinery. The agent made a bill of sale or deed thus: "I, as the agent, attorney, &c." and it was signed by the agent as attorney for the principal. This was held to be a bad execution of the power, and not binding on the principal.

It is, indeed, true of these cases, as was said on the argument in reply, that they relate to contracts either executory or executed, not to releases, discharges or deeds of composition. But it is difficult to perceive any difference in principle; and no exception is made by the cases beyond those which I have stated. It is impossible to find any general rule of law entirely filled up in the books of reports by apposite illustrations in all its bearings. The one under consideration is as nearly so as almost any other, even were we to stop with the books already cited. On farther search, however, I find that we are not without an authoritative application of the rule to a case of a mere relinquishment

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of right. In *Clarke's lessee v. Courtney*, 5 *Peters*, 819, a power of attorney was set up to relinquish and disclaim title, as it was called, in favor of the state of Kentucky, under a statute of 1794; and this being executed thus: "I, the said C. L. C., attorney as aforesaid, &c., do hereby relinquish, &c. In witness whereof the said C. L. C., attorney as aforesaid, has hereunto, &c. C. L. C. (L. S.)," it was holden void within *Combe's case*. *Vide id.* 349, 350, *et seq. per Story, J. and the cases cited by him at p. 351.*

The paper set up as a release by Grannis & Mead being void on its face as a defective execution of the power, it cannot be made available by parol proof that it was intended as a good execution, or, as it is expressed by the offer, that the instrument was executed under and in pursuance of the power, and that the plaintiffs recognized the act by receiving their share of the \$9,000. To such evidence, there are several clear objections. The legal effect of the instrument was to bind Grannis & Mead personally; and evidence that it was intended to bind others would violate the rule which forbids the varying of a written instrument by proof *aliunde*. The rule was considered and applied to an instrument of this character, in *Stackpole v. Arnold*, 11 *Mass. R.* 27. See also *Arfridson v. Ladd*, 12 *id.* 173, and *Pattison v. Hull*, 9 *Cowen*, 747, 753. Again: admitting a parol authority or recognition to be valid so far as this deed of composition respects real estate, and that it is not within the statute of frauds, 2 *R. S.* 69, § 8, 9, 2d ed.; 1 *Sug. Vend. Brookfield ed. of 1836*, p. 120 to 125, and the cases there cited, still, the authority itself wanting a seal, it would, according to *Blood v. Goodrich*, 9 *Wendell*, 68, be unavailable as a power for the purpose of making a deed. *Vide id.* 76, and the cases there cited by *Savage, C. J.*

It is proper to notice in this place, that the objection to the instrument executed by Grannis & Mead, which included a receipt for \$9,000, in connexion with the fact that a portion of that sum falling to the plaintiffs' share was received in payment *pro tanto*, was not urged at the trial, any farther than as it went to

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*make out a full defence* by validating the instrument ; and the judge afterwards remarked that the defendants were at liberty to prove a payment or satisfaction, partial or total, in money or by a conveyance of land. But the plaintiffs did not offer any evidence for that purpose. It is now said, for the first time in the cause, that the deed of Grannis & Mead, embodying the receipt of an agent within the scope of his authority, especially when followed by the offered proof of an acceptance of the money, would have proved at least a payment of so much ; and complaint is made that, by the ruling of the judge, the defendants were cut off from a proportionable abatement of the damages. There can be no doubt, from what appears in the case as far as it went, that the defendants might, if they would, have abated the recovery by showing what portion of the sum received should have gone in extinguishment. But it is equally true that so far from being precluded that right, the plaintiffs forbore to question it, and the judge expressly suggested that the defendants might prove a payment. Yet, it is remarkable that they neglected all proof showing an apportionment, and withheld any proposition that the \$9,000, or any part of it, should be applied as payment, even under the proof already given. They virtually answered, " We go the whole defence, or none." Why that should be so, we are not to inquire. Probably they were conscious of some frailty even in this partial defence, which would be fatal to it ; and we are not to interfere on the ground that there was a possible pertinency in the evidence which the defendants themselves would not avow even under the invitation of the judge. Independent of that, it was their duty to declare the object of their evidence. It is every day's experience that evidence may be relevant for one purpose, while for another it is impertinent. 1 *Phil. Ev.* 7 ed. 169. *Per Lord Tenterden, C. J. in Taylor v. Williams, 2 Barn. & Adol.* 833.

The objection that the note was issued by Thomas Evans for his own benefit as a member of his firm, and that the blank for the sum was filled and the note negotiated without authority to use it in the purchase of goods, was not much insisted on in

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argument ; and is clearly not available as against these plaintiffs who are *bona fide* holders; *Vallett v. Parker*, 6 *Wendell*, 615. *Dean v. Hall*, 17 *Wendell*, 214, 221.

The motion for a new trial must be denied.

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## WATSON &amp; POLHEMUS vs. SPENCE.

A decree of foreclosure of the equity of redemption, and a sale in pursuance thereof on a bill filed against the mortgagor alone, do not affect the rights of purchasers deriving title to the premises from and under the mortgagor, and who were not made parties to the bill in equity.

After forfeiture, a mortgage in possession may continue to hold until payment of the mortgage moneys, and so may his assignees; but not so a purchaser, under a decree against the mortgagor on a bill filed against him alone, after all interest in the premises has passed from him by conveyance or by operation of law. The decree in such case is void for want of jurisdiction in the court of chancery, as it respects the purchasers under the mortgage, and consequently all subsequent proceedings are void.

To give effect to a decree in chancery, notice of the suit must be brought home to the party to be affected by it; if his name appear in the record, notice will be presumed, but not otherwise.

A purchaser, under a void decree in possession of land, is viewed as a stranger, and cannot protect himself against the owner of the equity of redemption, by setting up an outstanding title in the mortgages, at whose suit the decree was obtained.

THIS was an action of *ejectment*, tried at the Tompkins circuit in October, 1831, before the Hon. ROBERT MONELL, one of the circuit judges.

The plaintiffs made title to the premises in question : 1. By a conveyance from *John Richardson* to *Polhemus*, one of the plaintiffs, bearing date 16th April, 1796 ; and 2. By a sheriff's deed to *Watson*, the other plaintiff, bearing date 14th April, 1801, in pursuance of a sale under an execution upon a judgment rendered in 1797, in favor of *Watson* against *Richardson*. On the part of the defendant, it was shown that *Richardson* purchased the premises in question of *Thomas Bridgen*, and on the 12th February, 1796, executed to *Bridgen* his bond and mortgage

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of the premises, to secure the payment of the consideration money; that on 11th February, 1803, the bond and mortgage were assigned to *Peter Jay Munro*, who, in 1807, filed a bill in chancery against *Richardson, alone* for the foreclosure of the equity of redemption, in which he stated, among other things, that a similar bill had been filed by Bridgen in the year 1799, and that the suit thus commenced progressed to a master's report after the bill had been taken *pro confesso*. Richardson put in an answer to the bill filed by Munro, and a decree for foreclosure and sale was obtained by Munro, in pursuance of which the premises were sold to *Thomas Morris*, and conveyed to him by a master's deed bearing date 29th August, 1810, *subject to all adverse claims to the same*, he taking upon himself *all chances and risks of title*. The plaintiffs objected to the evidence of foreclosure of the mortgage as inadmissible, *on the ground that they had not been made parties* to the proceeding; but the objection was overruled. The defendant deduced a regular title from Morris to him. The jury, under the charge of the judge, found a verdict for the defendant, which the plaintiffs now moved to set aside. There were other questions besides the above agitated on the trial, but as they are not passed upon in detail, by the court, are not here noticed.

*A. Gibbs*, for the plaintiffs.

*S. Stevens*, for the defendant.

*By the Court*, COWEN, J. *Richardson*, previous to the filing of Munro's bill, had parted with all his interest in lot No. 14, of which the premises in question were a part. He had first in 1796, sold it to *Polhemus*, one of the plaintiffs, and in 1801, *Watson*, the other plaintiff, purchased it under a *fi. fa.* on his judgment of January term, 1797. After all this, Munro, the assignee of Bridgen's mortgage, files his bill against *Richardson alone*, and obtains a decree of sale. It is perhaps the same thing whether we take as the basis of the foreclosure the bill filed by

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Munro in 1807, or Bridgen's bill recited in it, which was filed in 1799. But the proceedings upon the recited bill not being proved in any way, for the answer of Richardson admitting them being after his title was gone to the plaintiffs, would not be evidence against them, the defendant must in strictness be driven to rely on Munro's bill alone. This clearly enables the plaintiffs to raise their main objection, which is, that *Richardson* having parted with his interest in the premises, and he being the sole party, and the decree and master's deed to Morris saving expressly the rights of all others not made parties, the plaintiffs are not to be affected. They are certainly not affected, farther than the decree against Richardson alone and the master's sale under it operate in their own nature, to displace their rights. It is a general rule, that a decree in equity shall not, any more than a verdict or judgment at law, either conclude or in any way prejudices the rights of those who are not parties to the suit; and it is perfectly clear that the decree, in this instance, would not cut off the power of the plaintiffs to redeem. It could not have that effect, even though they were no more than ordinary incumbrancers. *Haines v. Beach*, 6 Johns. Ch. R. 459. *Lyon v. Sanford*, 5 Conn. R. 554. *A fortiori* as to subsequent purchasers of the mortgagor's whole interest, before the bill filed against him. *Cooper v. Martin*, 1 Dana, 25, 26. *Rogers v. Jones*, 1 McCord's Ch. R. 221, 227. This is the first time, I believe, however, that either subsequent encumbrancers or purchasers have denied all effect whatever to such a decree against them, even the passing the mortgagor's right, subject to the power of his assignees to redeem. The reason for that may be, that a foreclosure so very defective has not heretofore been set up against them.

If the decree had stopped with a strict foreclosure against the mortgagor, what would have been the effect? What is the nature of the original contract? It was a conveyance in fee to the mortgagee, defeasible on payment at the day. A default of payment entitled the mortgagee to possession, subject to the mortgagor's right to redeem. If the mortgagee, as such, had

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obtained possession, he could still hold until payment. *Van Dyne v. Thayer*, 14 *Wendell*, 233, 236. *Phyfe v. Riley*, 15 *id.* 248. He would be under the original mortgage. His title is coeval with that. Then the court calls upon the mortgagor to redeem or be forever foreclosed. He is in default and is actually foreclosed. The right of the mortgagee is not weakened by such a proceeding. Up to the time of foreclosure, the mortgagor notwithstanding he may have assigned the equity of redemption, has a right to pay the money, in respect to the privity of contract between him and the mortgagee. He is most commonly holden to pay, not only by the mortgage, but by bond or note, &c. and for the complete perfection of the title, must be made a party. But after he has sold out, of what avail is the payment? It might discharge his personal debt; but I cannot perceive that any power of redemption remains to him in his own right. He may go to redeem in the name of his assignee, or in his own name for the benefit of the assignee, and so may any other man, if the assignee will consent; but the act of payment must enure to the benefit of the person owning the equity of redemption. What is an equity of redemption? At law, as between the mortgagor and mortgagee, it is not known. By default of payment, at any rate, all legal title of the mortgagor is gone. In the eye of chancery, however, he owns an equity of redemption, which in that court is considered an estate in fee. 1 *Pow. on Mortg. Rand's ed.* 250. b., 251 a., 252, and the notes. By the cases cited at these pages, it will be seen that it may descend to the heir at law, and may be devised or sold as real estate. With us even at law, it is bound by a judgment as real estate, and passes by sale under a *fi. fa.* *Waters v. Stewart*, 1 *Caines' Cas. in Er.* 47. In the case at bar, therefore, all right to the land had gone from Richardson when Munro came with his bill. At law, the fee was in Munro, as the assignee of Bridgen the mortgagee; in equity and at law, it had passed from Richardson by his deed to Polhemus, or by the sheriff's sale to Watson; Munro might claim at law as standing in the place of the mortgagee. He might assign his legal right to another. But it is not perceived how a decree of strict fore-



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closure, on a bill filed against Richardson, could have added any thing to Munro's right. There was nothing legal or equitable remaining in Richardson, upon which a decree of foreclosure could operate. He himself could no longer file his bill to redeem. *Ingersoll v. Sawyer*, 2 *Pick.* 276, 277, 278. Suppose after the mortgagee has assigned, a bill should be filed against him alone and a decree taken by the mortgagor to redeem; could any one be brought to doubt that the whole proceeding would be *coram non judice*, and void in respect to the assignee? What is the effect of a decree of strict foreclosure? It changes what was before but a chattel interest, into a vested and absolute estate, from the time of the final decree. 2 *Pow. on Mortg. Rand's ed.* 423 a, to 425 a, and the notes. It is possible, however, that such an effect can be wrought by a decree against a mere stranger who holds no interest either in law or equity?

So far, I have considered the case as one of strict foreclosure in favor of Munro; and it is impossible that he could, by such a proceeding at all improve, though certainly he would not impair, the right personal to himself. He would in that case have himself sold and deeded to Morris, instead of leaving that to be done by a master; and a title thus passing down to the defendant would perhaps have connected him with Bridgen, by deeds enuring as consecutive assignments of his interest as mortgagee. In this way, the defendant might have maintained his possession, as assignee *pro tanto*, although the decree should be disregarded as a nullity. *Phyfe v. Riley*, 15 *Wendell*, 248. *Jackson, ex dem. Minkler, v. Minkler*, 10 *Johns. R.* 480. But the rights of Munro, as mortgagee never passed from him. He never assigned his interest, nor conveyed it in any form. He obtained a decree which was a nullity, because against a mere stranger. This void decree directs an account and foreclosure, a sale and deed by a master; the latter equally void, of course, with the decree from which it emanated. It passed nothing; and, therefore, the defendant took nothing through the mesne conveyances from Morris down to him. In short, the objection is, that the whole proceedings in the court of chancery and in

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the master's office, passed without the court acquiring jurisdiction. It is a conceded fact that not a soul having a particle of interest in the equity of redemption was ever served with process; and *non constat* ever heard of the process. The bill seeks no party beside Richardson, who had no more interest than the master who made the sale. The jurisdiction of the court of chancery is, like that of every other court, open to be questioned in a collateral proceeding. The question usually occurs in respect to courts of neighboring states, where the cases are numerous, that, to give any sort of life to the decree, notice must be brought home to the party whose interests are to be affected. Numerous cases to this effect are cited by Chancellor Walworth in *Bates v. Delavan*, 5 *Paige*, 299. They are equally in point, because equally binding, with domestic decrees. Service of process, I admit, must be presumed where the party is named; but his name not being on the record, there is no room for presumption.

The consequence is, it seems to me, inevitable, that the plaintiffs are entitled to recover; or rather the plaintiff Polhemus, who took under the deed of 1796, which preceded even the Watson judgment. Against him, none but the mortgagee or his assignee can defend, and neither is here. The defendant is a stranger; and it is well settled that he has no right to protect himself against the owner of the equity of redemption, by showing an outstanding title in the mortgagee. As against the defendant, Polhemus is the owner of the fee and is entitled to treat the defendant as a wrong-doer. *Collins v. Torrey*, 7 *Johns. R.* 278, 282, *per Kent, C. J.* *Astor v. Hoyt*, 5 *Wendell*, 603, 613, *et seq. per Savage, C. J.*

I am aware, that in holding this decree to be void, we are giving it a less effect than would be due to a summary foreclosure by advertisement under the statute. But that is owing to the special provisions of the act, which makes a public notice equivalent to the filing of a bill and service of process on the mortgagor, and all claiming under him by actual purchase of the equity of redemption.

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It is not necessary to examine the other grounds taken by the plaintiffs. Nothing being shown to divest their title, the judge erred in directing a verdict for the defendant; and there must, for that reason, be a new trial.

New trial granted.

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 WHITE and others vs. CONVERSE & PHELPS.

*Nil debet* is not a good plea to a declaration in debt on recognizance; the statute relative to notice of matter to be given in evidence on the trial, to be served with the plea of *nil debet*, does not authorize that plea to be interposed in cases other than those in which before it was proper.

DEMURRER to a plea of *nil debet* put in to a declaration in debt on recognizance of bail in this court.

A. Taber, for the plaintiffs, in support of the demurrer, cited 1 Cowen, 670; 3 Wendell, 24.

M. T. Reynolds, for the defendants.

BY THE COURT. The plea is bad. It has been supposed by counsel that the language of the Revised Statutes in the section 2 R. S. 352, § 10, authorizing notice of matter intended to be proved on the trial to be given with the plea in certain cases, had changed the rule of pleading in allowing *nil debet* to be interposed in cases where heretofore it had not been permitted. This is a mistake. The language of the statute is "whenever he," the defendant, "shall plead *nil debet* to an action of debt on judgment," he may give notice, &c. The sole object of the statute in reference to this plea was to authorize notice of special matter to be given with the plea of *nil debet* in cases where *such* plea might before the statute have been put in according to the settled rules of pleading.

Judgment for plaintiffs.

END OF OCTOBER TERM.

**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**COURT FOR THE CORRECTION OF ERRORS**  
**OF THE**  
**STATE OF NEW-YORK,**  
**during THE YEAR 1838.**

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**SALTUS & SALTUS vs. EVERETT.**

Where the *owner* of personal property has not conferred upon the *vendor* the apparent *right of property* or *right of disposal*, a purchaser is not protected against the claims of the *owner*, though such purchaser acquire the property for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim or knowledge of any suspicious circumstances calculated to awaken inquiry, or put him on his guard; and *it was accordingly held*, in this case, that the purchaser of part of a cargo of a vessel, was not protected against the claims of the *real owner*, although the purchase was made under a *bill of lading* regular and *fair*, on its face; it appearing on the trial of the cause, that the master of a vessel in which the goods were originally shipped had *fraudulently*, at an intermediate port transhipped the goods into another vessel, and procured a *bill of lading* in his own name, which he transferred to his agents, the vendors.

The owner has conferred such *apparent* right of property upon the vendor when he, *the owner*, has sold goods and *delivered possession* thereof, although they were in fact obtained from him *fraudulently*; not so, where they are obtained *feloniously*.

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- So he has conferred the *apparent* right of disposal, when he has furnished the vendor with the external *indicia* of such right, as where a *bill of lading* is sent to a consignee with the power of transfer.
- So authority to sell may be *implied*, as well as be *express*, as where goods are placed by the owner in the custody of a person whose common business it is to sell goods. The mere shipment of merchandize does not confer upon the *master* of the vessel authority to dispose of the goods, unless in a case of necessity; and then the burden of proof showing the necessity lies upon the purchaser. A *carrier by sea* and a *carrier by land* stand in the same relation to the owner of the goods.
- The doctrine that *possession* carries with it the evidence of *property*, so as to protect a person acquiring property in the usual course of trade, is limited to *cash, bank bills, and bills payable to bearer*.
- It seems*, where a *lien* upon goods exists, and the party when *demand* of the goods is made, asserts his right to hold as *purchaser*, and not on account of the lien, that he cannot in an action brought against him protect himself under the lien.
- A *tender* of the charges must be made before suit, where a *lien* exists, unless the goods have been parted with; in which latter case all that can be claimed by the defendant is a mitigation of damages by way of recoupment.

ERROR from the supreme court. *Everett* brought an action of *trover* in the superior court of law of the city of New-York against Messrs. *Saltus*, for a quantity of lead. In August, 1825, *Bridge & Vose*, merchants at New-Orleans, shipped 179 pigs of lead on board the brig *Dove*, of which *William Collins* was master, consigned to Messrs. *Tufts, Eveleth & Burrell*, of New-York, on account and risk of *Otis Everett*, the plaintiff, to whom they referred for instructions. The *Dove* put into *Norfolk*, in distress, and part of the lead was sold, to pay expenses, and the residue was transferred in December, 1825, by an agent of Capt. Collins, to the schooner *Dusty Miller*, Captain *Johnson*, who signed a bill of lading, acknowledging the lead to have been shipped by F. M., agent for *William Collins*, and promising to deliver the same in New-York, to order, on payment of freight. The *Dusty Miller* met with a disaster on her voyage to New-York, and on her arrival there, the lead, by the order of Captain Collins, was delivered to the firm of *Coffin & Cartwright*, who paid the freight, and \$72.87, the *average contribution* charged upon the lead, for the loss occasioned by the disaster to the *Dusty Miller*. On the 9th March, 1826, *Coffin & Cartwright* sold the lead to the Messrs. *Saltus*, the defendants, for \$542.74, and received payment. The freight of the lead from New-Orleans to New-York amounted to

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§14.72. Everett brought an action against *Coffin & Cartwright*, to recover the value of the lead, but was *non-suited*, in failing to prove that before suit brought, he offered to pay the *freight, average and charges* to which the lead was liable; and which had been advanced by Messrs. Coffin and Cartwright, and this court, on application, refused to set aside the non-suit. See 6 *Wendell*, 603. In October, 1831, the plaintiff demanded the lead of the Messrs. Saltus, and offered to pay any lawful demands they had on the same; to which they answered, that they would have no further communication on the subject. It was proved that in March, 1826, one of the firm of *Tufts, Eveleth & Burrell* demanded of the Messrs. Saltus the lead, or its value, and received for answer, that they had bought the lead, and paid for it, and would not do any thing about it. Upon this evidence the plaintiff was again non-suited. Whereupon he sued out a writ of error, removing the record into the supreme court, where the judgment of the superior court was *reversed*. See opinion delivered in the supreme court, 15 *Wendell*, 475, *et seq.* The defendants then removed the record into this court, where the cause was argued by

T. T. *Payne*, for the plaintiffs in error.

T. *Sedgwick, jun. & S. P. Staples*, for the defendant in error.

*Points on the part of the plaintiffs in error :*

I. The plaintiffs in error having purchased the lead in question in good faith, for a full consideration, without notice, either actual or constructive, of any right or claim of the defendant in error, from a party having possession of it, provided with all the evidences of property, and that, too, through the confidence reposed in such party by the agents of the defendant in error, ought to be entirely protected in their purchase. *Mowry v. Walsh*, 8 Cowen, 238. *Root v. French*, 13 *Wendell*, 572. *Parker v. Patrick*, 5 Durn. & East, 175. *Queiroz v. Trueman*, 3 Barn. & Cress. 342. *Freeman v. East India Co.* 5 Barn. &

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*Ald.* 617. 2 *Kent's Comm.* 325. 1 *Bell's Comm.* 280, 287. 2 *Saund.* 47, b. *Bro. Trespass*, 216, 295.

II. The lead in question was not proved to be the property of the defendant in error; certainly not with sufficient strictness to give him the right of possession, and to entitle him to recover, as general owner, against the plaintiffs in error, who, at least, had a special property in it. Admitting the bill of lading, from New-Orleans, to be sufficiently proved, it shows that the right to sue, if any, was in the consignees, Tufts, Eveleth & Burrell. *Evans v. Marlett*, 1 *Ld. Raym.* 271; 12 *Mod.* 156, *S. C.*; 3 *Salk.* 290, *S. C.* *Lickbarrow v. Mason*, 2 *T. R.* 74. *Gordon v. Harper*, 7 *id.* 12. *Evans v. Marlett* is quoted and relied upon by Buller, J., in his opinion in error in *Lickbarrow v. Mason*, printed in a note to *Newsom v. Thornton*, 6 *East*, 22. *Yates v. St. John*, 12 *Wendell*, 74.

III. The rights of the plaintiffs in error cannot certainly be inferior to those of their immediate vendors, and they must, at least, be protected to the extent of the freights and average, which were lawful charges upon the property itself. *Everett v. Coffin & Cartwright*, 6 *Wendell*, 605. *Daubigny v. Duval*, 5 *T. R.* 604. *Queiroz v. Trueman*, 3 *Barn. & Cress.* 342.

IV. No tender was made to the plaintiffs in error, which could have the effect to discharge these rights, nor was there any conduct on their part which can be interpreted as a waiver of it. *Kraus v. Arnold*, 7 *Moore*, 59. *Brady v. Jones*, 2 *Dowl. & Ryl.* 305. *Dunham v. Jackson*, 6 *Wendell*, 22. *Bakeman v. Pooler*, 15 *id.* 639.

V. The plaintiffs in error have the superior equity, in the circumstances of the case; and the defendant in error having exercised his election as to whom he would sue, and having failed in his suit, ought not to be allowed to come upon the plaintiffs in error, especially after their guaranty in the former suit.

*Points on the part of the defendant in error:*

I. The plaintiff being owner of the lead in question, had a

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right to recover it in this action from any person into whose hands it might come. *Everett v. Coffin*, 6 *Wendell*, 609. 2 *Black. Comm.* 449. *Paley on Agency*, 262. 2 *R. S.* pt. 4, ch. 1, tit. 3, art. 5. *East's Pleas of the Crown*, 697. *Paterson v. Tash*, 2 *Strange*, 1178. *J. Kelyng*, 81, 82. *Abbott on Shipping*, 4th *Am. ed.* 241. *Syeds v. Hay*, 4 *T. R.* 261. *Daubigny v. Duval*, 5 *id.* 604. *Miller v. Race*, 1 *Burr.* 452. *Hartop v. Hoare*, 1 *Wils.* 8. *Wilkinson v. King*, 2 *Campb.* 335. *McCombie v. Davies*, 6 *East*, 538. *Freeman v. East India Co.* 5 *Barn. & Ald.* 615; 7 *Com. Law R.* 211, *S. C.* *Guerreiro v. Peele*, 3 *Barn. & Ald.* 616. *Morris v. Robinson*, 3 *Barn. & Cress.* 196. *Loeschman v. Makin*, 2 *Starkie*, 312. *Wheelwright v. Depeyster*, 1 *Johns. R.* 471. *Prescott v. Deforest*, 16 *Johns. R.* 159. *Mowry v. Walsh*, 8 *Cowen*, 242. *Williams v. Merle*, 11 *Wendell*, 80. *Root v. French*, 13 *id.* 572. *Gibson v. Culver*, 17 *id.* 310. *Kinder v. Shaw*, 2 *Mass. R.* 398. *Vincent v. Cornell*, 13 *Pick.* 297. *Leckey & McDermott*, 8 *Serg. & Rawle*, 500. *Rapp v. Palmer*, 3 *Watts*, 178. *Potter v. Lansing*, 1 *Johns. R.* 223. *Davis v. James*, 5 *Burr.* 2680. *Dawes v. Peck*, 8 *T. R.* 330.

II. The defendants never had any lien of any kind on the property in question, and therefore there was no necessity for a tender. *Lempriere v. Parley*, 2 *T. R.* 485. *Kinlock v. Craig*, 3 *id.* 119. *Id.* 786. *Daubigny v. Duval*, 5 *id.* 604. *Maddin v. Kempster*, 1 *Campb.* 12. *Sweet v. Pym*, 1 *East*, 4. *McCombie v. Davies*, 7 *id.* 7. *Martini v. Coles*, 1 *Maule & Selw.* *Hiscox v. Greenwood*, 4 *Esp. R.* 174. *Hartley v. Hitchcock*, 1 *Stark*, 330. *Urquhart v. McIver*, 4 *Johns. R.* 112. *Ingersoll v. Van Bokkelen*, 7 *Cowen*, 671.

III. If the defendants had a lien on the property, or a right to recover the freight and average on the lead before they gave it up, they waived it by claiming to be the rightful owners of the property as purchasers, or by refusing on that ground to do any thing about it. *Boardman v. Sill*, 1 *Campb.* 410. *White v. Gaines*, 2 *Bing.* 23; 9 *Com. Law R.* 302, *S. C.* *Thompson v. Trail*, 3 *Barn. & Cress.* 36. *Judah v. Kemp*, 2 *Johns. Cas.* 412. 2 *Phil. Ev.* 121, 122, 123. *Hall v. Daggett*, 6 *Cowen*, 655.



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IV. If the doctrine of lien is to be extended to such a case, then the offer made to pay the demand of the defendant was sufficient. 3 *Starkie's Ev. Tender*, 1394. *Douglass v. Patrick*, 3 T. R. 683. *Thomas v. Evans*, 10 East, 101. *Carroll v. Peake*, 1 Peters, 24. *Slingerland v. Morse*, 8 Johns. R. 476. *Harding v. Davies*, 2 Carr. & Payne, 77. *Dunham & Jackson*, 6 Wendell, 33. *Mills v. Hunt*, 17 id. 333.

After advisement the following opinions were delivered :

By the CHANCELLOR. The plaintiffs in error were not entitled to the goods in question on the ground, that they were the purchasers thereof without notice of the rights of the real owner ; they were in the same situation in this respect as every other purchaser of goods from a person who had no authority to sell. If the owner of the goods had caused the bill of lading to be made out in the name of *Collins*, so as to give him a prima facie right to the goods as owner, or consignee for his own benefit, a bona fide purchaser might have been entitled to protection. The principle adopted in the case of *Mowry v. Walsh*, 8 Cowen, 238, might be applicable to such a case ; but here the change of the bill of lading itself was a fraudulent act on the part of the master of the vessel, or his agent, and could not defeat the right of the owner of the goods who had not authorized any such change. The bill of lading is, by the custom of merchants, transferable, so as to vest in the assignee the title to the goods which the assignor had in them ; but if a person without authority from me ships my goods and takes a bill of lading in his own name, he cannot, by assigning that bill of lading to another, divest my title to the property. If by the perils of the sea, or otherwise, the master of the *Dove* was unable to continue the voyage, and he was obliged to send on the cargo by another vessel, he had no right to change the consignee of the goods ; and if he wished to retain a lien upon the goods for the freight *pro rata itineris*, he should have done so by a special clause in the new bill of lading. In this case the unauthorized sale of the goods in the port of New-York, by the master of the *Dove*, was probably

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such an act as would now be a felony, under the provisions of the Revised Statutes prohibiting carriers of goods, delivered to them to be transported for hire, from embezzling the goods or converting the same to their own use; and even at the time when this transaction took place, no rights could be acquired by third parties, as against the owner of the goods, by such a fraudulent act of the carrier to whom they were entrusted for carriage or transportation merely.

The question does not arise on this writ of error whether the Messrs. Saltus by the purchase were substituted in the place of Coffin & Cartwright as to the *lien* upon the goods for the freight paid by them to the master of the *Dusty Miller*. If there had not been an actual conversion of the goods before the commencement of the suit, the question would arise whether there ever was a lien which the purchasers from Coffin & Cartwright could claim the benefit of; and, if such lien existed, whether it had not been waived by putting their claim to retain the goods upon other grounds. It appears, however, by the evidence, that the plaintiffs in error had actually converted the goods, by selling them on the day of their purchase; and if they once had a lien which would have rebutted the presumption of a conversion, from the mere fact of refusing to deliver on demand, when the amount of the lien was not tendered or offered to be paid, a tender after they had put it out of their power to receive the money and deliver the goods, by an actual sale, would have been a useless ceremony, and was not necessary to enable the owner of the goods to recover in an action of trover. In such a case if there was a valid lien in favor of the defendants before the conversion, they would be entitled to be *recouped* in the damage, to the extent of such lien; but they could not defeat the plaintiff's action altogether.

The bill of lading signed by Collins at New-Orleans was only *prima facie* evidence that the consignees were the owners of the property, and the letter of Bridge & Vose, the shippers, which was sent to the consignees with the bill of lading, was sufficient to rebut that presumption and to show that the property really

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belonged to Otis Everett of Boston, in whose name the suit was brought. Besides, one of the consignees was examined as a witness, and proved that Everett, and not the consignees at New-York, was the real owner of the goods. I have no doubt, therefore, that the judgment of the supreme court was correct, and that it ought to be affirmed.

By Senator VERPLANCK. This cause, though of small magnitude as to the amount of property in question, has been contested in various forms through all the courts to this tribunal of last resort.

The spirit of contentious litigation ought to find little favor here ; yet in this instance, I think, the parties have deserved well of the public, because the main question in the case is of great importance and must frequently arise in a commercial community. It ought, therefore, to be distinctly settled on principles of general application. That those principles are not very clearly settled in our state, we need no higher evidence than the manner in which this cause now comes before us. The supreme court have reversed the unanimous decision of the superior court of law of the city of New-York, and on the broad principles governing the questions which we are now to decide, there is a direct contrariety between the opinions of our highest court of common law and those of our most eminent commercial tribunal, as delivered by their chief justice, who was formerly chancellor of this state.\*

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\* The following is what was said by Chief Justice Jones in the superior court of law of the city of New-York, on the main question in this case :

" It must be conceded, that a purchaser, for a fair and valuable consideration in the usual course of trade, without notice of any conflicting claim, or any suspicious circumstances to awaken inquiry, or to put him on his guard, will, as a general rule, be protected in his purchase, and unaffected by any latent claims. But there are exceptions to this rule, and it is supposed by the plaintiff that he comes within them. He was the owner of the lead, and Collins, the master, who assumed the power of disposing of it, was a mere carrier, to whom it was entrusted for the purpose of transportation ; and the sale of it, by him, was without necessity, and wholly unauthorized. It is, on this ground, contended that the sale was void, and that no title passed by the transfer. There can be no question, that an agent for a special purpose, has no authority to sell the property of his principal, unless in cases of abso-

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The main question depends upon and involves the general rule that ought to govern, between the conflicting rights of *bona fide* purchasers of personal property, bought without notice of any opposing claim, and those of the original owner divested of the possession or the control of his property by accident, mistake fraud or misplaced confidence. The original owner now claims his lead against purchasers who bought for a fair price, in the usual course of trade, from persons holding the usual evidence of such property, (a bill of lading endorsed to them,) and in actual possession of the goods. Of these two innocent parties, which of the two is to bear the loss arising from the wrong-doing of the third?

The universal and fundamental principle of our law of personal property, is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor. That "no one can transfer to another a better title than he has himself," is a maxim, says Chancellor Kent, "alike

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into necessity; and it is admitted that a master of a vessel stands in that relation to the shipper of goods. But a master, who is at the same time consignee of the goods, and, for still higher reasons, one who fills himself the character of shipper, has an undoubted power to sell, and his *bona fide* transfers will be effectual to purchasers, against any secret trust for others, with which his apparent title may be affected. If it be known to the purchaser that the vendor acquires the possession of the goods and his title to them, in quality of shipmaster, or if he has notice of any circumstances tending to show that others are interested in the property, he buys at his peril, and his title will be invalid as against the true owner. There is, moreover, one class of cases to which the law extends a still greater protection. It is the case where the vendor acquires the possession of the goods without any act or agency of the owner, and against his will: as, for example, *where they are stolen*, or come to the possessor *by finding*. In the first of these cases, no title can be transferred, even to a *bona fide* purchaser; and in the last, the whole burden of proof, to sustain the purchase, is thrown upon the buyer. Reasons of policy, as well as a sense of justice, have led to these rigid rules in those special cases, and the favorable operation of them, as general principles, to the community at large, reconciles us with the severity with which they sometimes press upon innocent purchasers. And all the cases cited are referable to, and governed by, these principles, as a short review of them will show. But does this case come within that privileged class? Collins was not the master of the vessel in which the lead was imported, but was the holder of the bill of lading signed by Johnson, the master, for it. He was the

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of the common and the civil law, and a sale, *ex vi termini*, imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor." The only exception to this rule in the ancient English jurisprudence was, that of sales in markets overt, a custom which has not been introduced among us. "It has been frequently held in this country that the English law of markets overt had not been adopted, and consequently, as a general rule, the title of the true owner cannot be lost without his consent." 2 *Kent's Comm.* 324, and cases there cited.

To whatever and however numerous exceptions this rule of our law may be subject, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. The chief justice of the superior court has said, in his opinion on this case, that "it must be conceded that a purchaser for a fair and valuable consideration in the usual course of trade, without notice of any conflicting claim or any suspicious circumstances to awaken inquiry, or to

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apparent owner. The bill of lading imported, that it was shipped by his agent for him, and it was consigned to order, and the bill of lading delivered to him. It was mixed up with goods of his own. He, thus vested with the apparent ownership, and possessing the documentary title, consigned the whole to Coffin & Cartwright, and contracted to sell the lead to the defendants, who completed the purchase with the consignees, and paid the price to them. There is no one circumstance in evidence tending to show the defendants that the plaintiff had any interest in the property, nor was there any thing unusual or extraordinary in the transaction to lead them to distrust the right of Collins to sell. It is not uncommon to consign goods to the master for sale by him. But, in this case, Collins did not act in the character of master, but of owner. He may have committed a fraud on the plaintiff, but fraud in the vendor is not of itself sufficient to invalidate the title of the purchaser. Who enabled Collins to commit the fraud, assume the ownership, and sell the goods? The agent of the plaintiff. He did not obtain the property by theft or by finding. The possession of it was delivered to him by the owner. The delivery was for a special purpose, it is true, but he was enabled, by that delivery, to change the character of the possession, and by the new bills of lading, from the intermediate agent at Norfolk, he fraudulently converted the property, represented himself as owner, and suppressed all evidence of his agency for the plaintiff. To hold a purchase, by an innocent party, of such a vendor to be invalid, as against the plaintiff, would be carrying the principle far beyond any case latterly decided, and tend to involve purchasers in great and unreasonable peril."

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put him on his guard, will, as a general rule, be protected in his purchase, and unaffected by any latent claim. But there are exceptions to this rule." Now I cannot agree with the learned chief justice that this is the general rule. On the contrary, I think it obvious that it is but the broad statement of a large class of exceptions to the operation of a much more general principle, and that statement of exceptions is subject again to many limitations. I have stated the general and governing law; let us now see what are precisely the exceptions to it.

The first and most remarkable class of these exceptions, relates to money, cash, bank bills, checks and notes payable to the bearer or transferable by delivery, and in short, whatever comes under the general notion of currency. It was decided by Lord Chief Justice Holt, at an early period of our commercial law, that money and bills payable to bearer, though stolen, could not be recovered after they had passed into currency; and this "by reason of the course of trade which creates a property in the holder." "They pass by delivery only, and are considered as cash, and the *possession* always carries with it the *property*." 1 *Salk.* 126. A long series of decisions, beginning with *Miller v. Race*, 1 *Burr.* 452, has now settled the law, that possession of such paper is presumptive proof of property, and that he who received it in the course of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker and others parties, even if the paper had been stolen from or lost by the former holder; such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances. These decisions have been argued upon as authorities (at least in the way of analogy) both at bar and in opinions of the courts, in cases involving the same question as to goods or other moveable property. Hence, it was inferred that goods bought or received "in the course of trade, stand on the same footing with bank notes or checks so received." But an examination of the cases

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will show that this part of the law of negotiable paper rests on grounds quite peculiar to itself, for the following reasons: 1. The protection of the *bona fide* holder of paper, transferable by delivery, extends even to cases where the paper has been lost or stolen. But it has been often decided that loss by accident, theft or robbery, does not divest the title of the owner of goods, nor give a title in them to a fair after purchaser. 2. The rule is put by all the authorities on the express and separate ground of the necessity of sustaining the credit and circulation of the currency. Thus Lord Chief Justice Hardwicke: "No dispute ought to be made with the holder of a cash note, who came fairly by it, for the sake of currency, to which discrediting such notes would be a great disturbance." See, too, the reasoning of Lord Mansfield, in all cases on this head decided before him. Thus says he, in the case of a stolen note, *Peacock v. Rhodes*, 1 *Doug.* 636, "An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule was applied to bills, it would stop their currency." Similar reasons are assigned for the same decision by American judges. 3. The analogy between notes and moveables or goods, is expressly denied in the leading cases on this head. Thus in reply to an argument founded on that similarity, Lord Mansfield answers, 1 *Burr* 457, "The whole fallacy of the argument rests upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz. goods, or securities, or documents for debts. Now they are not goods, nor securities, nor similar to them; they are treated as cash to all purposes," &c.

Setting wholly aside then, this part of the law as to cash, bank notes, and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in other instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this state, that have been cited or

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referred to, I come to this general conclusion, that the title of property in things moveable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and *in those only*, where such owner has by his own direct voluntary act conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more.

I. The first is, when the owner with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error, as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a *bona fide* purchaser in the customary course of trade, the second buyer was protected in his possession against the defrauded original owner. *Mowry v. Walsh*, 8 Cowen, 243. So, again, where the owner gave possession and the apparent title of property to a purchaser, who gave his worthless note, in fraudulent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner. *Root v. French*, 13 Wendell, 572. See also *McCarty v. Vick*, 12 Johns. R. 348. In all such cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of property, though such consent might be temporary only, obtained by fraud or mistake, and therefore revocable against such unfair first purchaser.

II. The other class of cases in which the owner loses the right of following and reclaiming his property is, where he has, by his



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own voluntary act or consent, given to another such *evidence* of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner "has given the external indicia of the right of disposing of his property." Here it is well settled that, however the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it.

Thus, the consignee, in a bill of lading, is furnished by his consignor with such evidence of right of disposal, according to the custom and law of trade, so that the *bona fide* holder of the bill endorsed by the consignee is entitled to all the rights of property of the consignor in those goods, if bought fairly in the course of business, although the actual consignee, under whose endorsement he holds, has no right to the goods as against the former owner. If such goods were not paid for, they might be stopped *in transitu* by the owner, unless his consignee has already assigned his bill of lading; but that assignment divests the owner of his right of stoppage against such assignee.

The famous series of decisions in the various courts in the case of *Lickbarrow v. Mason*, 2 T. R. 63, 2 H. Black. R. 11, 5 T. R. 367, which led to the establishment of the doctrine of this qualified negotiability of bills of lading, memorable alike in legal and commercial history, strongly illustrates the whole question before us. There, Buller and his associate judges, trained up at the feet of the great father of English commercial jurisprudence, maintained and established the law as we now hold it, under the influence of Mansfield's genius, upon his reasoning and on his authority, against those of Lord Loughborough and others, the most learned lawyers of their times. All the arguments and admissions of both sides show how deeply the general principle is rooted in the law of England, that (to use Lord Loughborough's words) "mere possession, without a just

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title, gives no property, and the person to whom such possession is transferred by delivery, must take the hazard of the title of its author." It is only as an express exception to this rule that it was maintained, and finally established, that the custom of merchants, evidenced and sanctioned by legal decisions, and founded on those conveniencies of trade, so admirably stated by Buller, had compelled the courts to consider the owner as giving his consignee evidence of the power of disposal, which it was not for him to dispute when the goods had fairly passed into other hands on the faith of that evidence. But there is no case to be found, or any reason or analogy any where suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently, as in this present case. The assignment of the bill of lading conveys, not an absolute right to goods, but the right and title merely of the actual consignor, who alone is bound by it.

Again : the owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them ; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading, as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances. "If a man," says Bayley, J. in *Pickering v. Busk*, 15 East, 44, "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell;" and the cause was decided on that ground. But this implied authority must arise from the natural and obvious interpretation of facts, according to the habits and usages of business ; and it never applies where the character and business of the person in possession, do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, to use an illustration of Lord Chief Justice Ellenborough, in the case just cited, a per-

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son entrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as an owner, or agent, and credit is not given as such, because he has possession of the watch; the owner, therefore, would not be bound by his sale. When these exceptions cease, the general rule resumes its sway; and the law is therefore clear, that an agent, for a particular purpose, and under a limited power, cannot bind his principal if he exceed his power. "Whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power." 2 *Kent's Comm.* 621, and the authorities there cited.

Beyond the precise exceptions I have above stated, I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner's misplaced confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property, or is robbed of it, or it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed on it, the owner can follow and reclaim it in the hands of any person, however innocent. Among the numerous cases to this effect, I will cite only that of *Howe v. Parker*, 2 T. R. 376, which I select not only on account of the strong and unhesitating manner of the decision, but because it was pronounced by the very judges who, in the case of *Lickbarrow v. Masyn*, had carried the protection of a *bona fide* purchaser under a bill of lading far beyond the rigor of the ancient law. There, plate had been pawned by a widow who had only a life interest in it under her husband's will, of which fact the pawnee had no notice. It was not doubted that the lien for the monies advanced on such pledge was void against the remainder-man, after the widow's death. "*Per curiam*: This point is clearly settled, and the law must remain as it is, until the legislature think fit to provide that the possession of such chattels is proof of ownership."

In order to decide in such conflicts between the claims of

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equally meritorious sufferers by the wrong of a third party, public policy must draw an arbitrary line somewhere, and the greatest merit of such a rule must be its certainty and uniformity.

The rule of our law, as I understand it, is perfectly consistent with the equity between the parties, as far as such equity can apply; and it serves the great interests of commerce, in a state of such extensive foreign and domestic trade as ours, by protecting the property of the stranger, as well as of our own citizens, against the possible frauds of carriers by sea, or by internal transportation, whilst it throws upon the resident merchant the responsibility of taking care with whom he deals, and teaches him a lesson of wholesome caution. It is no mean proof of the wisdom of the rule, that it agrees in substance with the provisions of the Napoleon Code. The code, like our law, holds as a general rule, that the sale of goods, by any but the true holder, is a nullity; "*La vente de la chose d'autrui est nulle.*" *Code Civil* III. art. 1599. It confines the authority of the special agent or *mandataire* to the strict limits of his power; and in sales, the power must always be special and express. *Code Civil*, art. 1989. It allows the right of *revendication* or stoppage *in transitu* against the insolvent or fraudulent purchaser or consignee; but that right ceases, as with us, against the consignee, when the goods have been fairly sold according to the bills of lading; "*vendues sans fraude sur factures et connaissements.*" *Code de Commerce*, Liv. III., art. 576, 577, 578. The Scotch law, as I gather from *Bell's Commentaries*, lays down a different rule, that "a purchaser, in the course of trade, should be protected in the purchase of goods from any one who has them in lawful possession." This agrees with the doctrine of our superior court, and might be a safe enough rule, if generally adopted and understood. But it is not the rule of our own law, which is perhaps quite as wise, as well as certainly founded on a much larger and wider commercial experience.

Let us apply these conclusions to the present case. Collins, the person whose sale it is asserted must divest the original

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owner of his rights in favor of the *bona fide* purchaser, stands, it is said by the superior court, in a double relation of "a master, who is at the same time the consignee of the goods, and who himself filled the character of shipper, and has therefore an undoubted power to sell, and his *bona fide* transfer will be effectual to purchasers against any secret trust for others with which his apparent title might be affected." Had the lead been consigned to Collins from the intermediate port, by the owner or his agent, this would be true. But it is shipped by Myers, of whom neither the owner, nor any one with full power to represent him in this matter, had any knowledge as an agent, and under whose care the vessel and cargo were placed by Collins, so that he appeared only as his representative, and thus he styles himself in the bill of lading. The plaintiff below comes in nowise within the rule I have stated. He has neither given to Collins documentary and mercantile evidence of property in a bill of lading from himself or his own agent with competent power, nor the evidence customary in business, such as to hold him out as an agent authorized to change the title of his property in his goods. The assumed authority of shipping goods in his own name and to his own order, at Norfolk, and the documentary evidence of it in the bill of lading, can have no more effect as to the title of the property, than if he had forged such a bill of lading at New-Orleans.

Neither does the selection of a ship and its master vest in the master any implied authority to sell the ship, or any part of her cargo. His business is to carry the goods, and no more, with some other clearly defined and very limited powers, to be exercised only in cases of absolute necessity. He stands in the same legal relation to his cargo with the watchmaker, in the case supposed by Lord Ellenborough, who has in his hands a watch to be repaired. He is not exhibited to the world as the owner, or agent for selling; and if he does sell it, the sale is void against the true proprietor. The law of shipping is well known to the commercial world, to declare that the master has no authority to sell the cargo, or any part of it, unless under circumstances of pressing necessity abroad; and of that absolute necessity, the

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burden of proof rests on the purchaser, and the presumption is against it. As Judge Bayley states the law, 3 *Barn. & Cress.* 196, "The captain has no right to act as *agent* for the owner of goods, unless in absolute necessity. The purchaser obtains no property by the act of his professing to sell." And this was held where the master acted in perfect good faith. How much stronger is the case of a probable fraud! Thus again: in *Freeman v. East India Co.* 5 *Barn. & Cress.* 619, Abbott, Ch. J., says, "a sale of a cargo, or any part of it, by the master, can confer no title, unless there was an absolute necessity;" and the reason of the rule is thus assigned by Judge Best in the same case: "A carrier by sea and by land stands in the same relation to the owner of goods to be carried. Their duty is to carry the goods, and the authority only such as is necessary. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he buys, will assure himself that there is a real necessity for the sale before he makes the purchase; and *caution on his part will prevent what has frequently happened, the fraudulent sale of ships and cargoes in foreign ports.*" Such, then, being the well settled and generally known law, the selection of a master or any other carrier, by sea or land, does nothing to exhibit such a carrier to the world as having the power of disposing of the goods he carries. The owner does nothing to enable him to commit a fraud on third persons. He gives merely a qualified possession, and if that is turned into an assumed right of ownership, it is a tortious conversion, and will not divest the owner's title.

It is true that the rule will sometimes, as was urged by Chief Justice Jones, "involve purchasers in great perils;" but that peril can scarcely be called "unreasonable," since there is a reason of public policy of at least equal weight to counterbalance this inconvenience. It is the same which is the ground of the absolute prohibition to a master or carrier to sell the goods he transports, except under insurmountable necessity; it is to prevent, in the language of the court in the case just quoted, 5 *Barn. & Cress.* 620, "fraudulent sales of ships and cargoes in foreign

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ports." Now the fraudulent consignment or change of the apparent evidence of property for the purpose of selling elsewhere, is but another form of the same evil. I may add that this same rule, however rigid and occasionally hard in its operations, is no small safeguard to the protection of the owner's rights in goods and other property, in active commerce necessarily placed under the temporary control, and in the legal though qualified possession of agents, sailors, carriers, boatmen, servants and clerks, as well as of those who may have them stored for safe keeping, and their clerks, porters and servants.

On the other question, as to the right of the defendants below to stand in the place of their vendor, and to be protected to the extent of the charges on the lead for freight, as claimed by Collins, I need say but little. The right of lien in such circumstances, (if any right exist here,) depends upon actual possession by the factor, or carrier, or his immediate agent. When the goods are sold and delivered to a third person, the lien, as such, expires with the possession. This is the distinction between the present case and the former suit against Coffin & Cartwright, who were immediate agents or bailees of Collins.

The two courts below have agreed in deciding against the validity of the objections to the evidence raised on the trial of the cause, and I have nothing to add to the reasons they assign; to all which I fully assent.

The importance of the principles and rules not only of decision but of active business involved in this cause, especially in relation to that vast and busy community which I immediately represent in this body, has led me to examine this whole head of law with an interest and at a length wholly disproportioned to the amount of value in controversy. If the views I have been able to present shall in any way, directly or indirectly, tend to settle the law on this head, or make it more clearly and correctly understood, the study I have given the subject will have been well bestowed.

I am of opinion that the judgment of the supreme court, reversing that of the superior court of New-York, be affirmed.

Judgment unanimously **AFFIRMED.**

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 American Insurance Company v. Ogden.
 

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## THE AMERICAN INSURANCE COMPANY vs. OGDEN &amp; McComb.

In the insurance of a vessel on *time*, the warranty of *seaworthiness* is complied with, if the vessel be in an unexceptionable condition at the commencement of the risk ; and the fact that she subsequently sustained damage, and was not properly re-fitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission.

A defect of *seaworthiness*, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the owner or his agents, discharges the underwriter from liability for any loss, *the consequence of such want of faith, prudence or diligence*; but does not affect the contract of insurance as to any other risk or loss covered by the policy, and not caused or increased by such particular defect.

The insurer is not liable either in the case of a *technical total loss* or *actual loss*, where it appears that the *necessity* the *prima facie* ground of abandonment though real, was yet the result of *culpable negligence*, or want of *due diligence* on the part of the owner or his agents.

Under ordinary circumstances, a vessel cannot be abandoned as for a constructive or technical total loss on the ground of the inability of the master to obtain funds to make necessary repairs, where the owner is chargeable with want of *ordinary prudence* in furnishing *funds or credit*, and especially where he has deprived the master of the means ordinarily possessed by him to obtain funds or credit.

In determining the right to abandon as for a *technical total loss* in reference to the cost of repairs, the parties, *it seems*, are concluded by the sum inserted in the policy as the value of the vessel, and are not allowed to give proof of its *real value*.

ERROR from the supreme court. Ogden and M'Comb brought an action in the *superior court of law of the city of New-York*, on a policy of insurance underwritten by the American Insurance Company, on *three-fourths* of a schooner, in the names of Ogden & M'Comb, as the agents of the owner—loss payable to them. The policy was on *time*, for six months from the 17th of November, 1829—sum insured, \$1,800. The vessel sailed the 26th November, on a voyage from *New-York* to *Charleston*, from thence to *Norfolk*, and from thence to *St. Thomas*, in the West Indies. Whilst going into Charleston harbor, and while the vessel was in charge of a pilot, the small *bower anchor* was lost on the outward bar. The schooner did not go up to the city, but discharged her cargo, which consisted of stone, about one



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and a half miles from the city. The vessel remained in the harbor five or six days; the pilot engaged to get up the anchor, but did not do so; and the wind being fair, the schooner sailed for *Norfolk*, where she arrived in safety. On her arrival there, the master made inquiries for an anchor, but could not procure one of a suitable size; those he saw were too *heavy* or too *light*. He remained at *Norfolk* nine or ten days, took in a cargo of shingles, and proceeded on his voyage to *St. Thomas*, on the 7th January. Three days afterwards, the schooner sprung leak, in consequence of a heavy cross sea, and in three days more, she encountered a severe gale of wind, with a heavy sea; her sails were split, and the mainmast sprung, and the vessel became very leaky. She however succeeded in reaching *St. Thomas* on the 25th January. The master, after making inquiries of mechanics, made an estimate that the vessel could not be repaired and rendered seaworthy for less than \$1,700. The cargo was discharged, and a survey was taken of the vessel by three surveyors appointed by the U. S. consul, who reported that the repairs might be made for \$800 or \$900. The master was wholly destitute of funds; the consignees of the cargo refused to make advances, the *freight* having been previously drawn for, and they holding a protested draft for the same; and money could not be obtained on *bottomry*, although the master attempted to raise money in that way for the purpose of making repairs. Under these circumstances, the vessel was sold at auction, and brought only the sum of \$388.32. The plaintiffs abandoned as for a *total loss*. The insurance company offered to pay the *damage* as estimated by the surveyors at *St. Thomas*; which offer the plaintiffs refused, and brought their suit. The counsel for the defendants requested the judge to charge the jury, 1. That *St. Thomas* being the port of destination, the inability of the master to procure there the necessary funds for repairing the vessel, was not a sufficient ground of abandonment; 2. That the policy being on time, the warranty of seaworthiness attached as a condition precedent at the commencement of each voyage during the period which it covered, and that it being admitted

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that the vessel was unseaworthy from the want of an anchor when she left Charleston, and also when she left Norfolk, the defendants were discharged from all subsequent perils ; or if the judge was of a different opinion, that then he should charge that the evidence was not sufficient to excuse the *laches* of the master in not recovering his anchor or obtaining a new one at *Charleston*, and that therefore the defendants were discharged from all subsequent liability ; and 3. That if the judge should be of opinion that the *laches* of the master at Charleston were sufficiently excused, then that he should charge the jury that it was the duty of the master, after his arrival at *Norfolk*, if an anchor could not there be obtained, to procure one from a neighboring port ; and if the jury should be of opinion that, by sending to Baltimore or New-York, or any other neighboring port, the master could have obtained an anchor without an unreasonable delay of the voyage, then that the defendants were entitled to their verdict. The judge charged the jury that the inability of the master to procure the necessary funds at St. Thomas was a valid cause of abandonment ; and further instructed them that the vessel continued to be covered by the policy during the voyage, and that the plaintiffs were entitled to recover if the negligence and laches imputed to the master were sufficiently excused, and that the material question of fact on that point was whether the master made use of due diligence at Norfolk to obtain an anchor. The defendants excepted to the charge. The jury found a verdict for the plaintiffs for \$2,161, on which judgment was rendered. The defendants sued out a writ of error, and removed the record into the *supreme court*, where the judgment was *affirmed*. See opinions delivered in supreme court, 15 *Wendell*, 535, *et seq.* The defendants thereupon removed the record into this court, where the cause was argued by :

*D. Lord, jun.* for the plaintiffs in error.

*S. P. Staples*, for the defendants in error.

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*Points for the plaintiffs in error:*

I. The warranty of sea-worthiness is a condition going to the whole contract of insurance. It attached as a condition at Charleston, and at Norfolk; and was broken by the sailing without a small bower anchor, and thus in a confessedly unfit state for the voyage; and the court erred, in not having thus charged the jury, as requested by the defendants' counsel. *Putnam v. Ward*, 3 Mass. R. 481. 2 Phil. on Ins. 114, 115. *Franklin v. Shaw*, 11 Pick. 227.

II. There was no legal evidence upon which could be submitted to the jury, the question of an excuse or laches at Charleston or Norfolk: 1. Because the master had no right to go to sea on a blind expectation of picking up an anchor he had lost in the ocean. 2. Because he had no funds nor credit to get an anchor at Charleston, and therefore there was no place for the exercise of diligence on the subject, and none was in fact exercised. 3. Because at Norfolk he had no funds, and he does not show that he had any credit; and for these reasons also no diligence there could be otherwise than illusory.

III. The breach of the condition of seaworthiness discharges the insurer from all subsequent losses, and is not a mere exemption from the consequences of the defect. *Phil. on Ins.* 117. 2 *id.* 103. *Park on Ins. ch. 11, of seaworthiness.* *Hughes on Ins.* 263, 269. *Christie v. Secretan*, 8 T. R. 192. *Silva v. Low*, 1 Johns. Cas. 184, 198. *Craig v. United States Ins. Co.* *Peters' C. C. R.* 410, 416. *Wilkie v. Geddes*, 3 Dow, 60. It is a condition annulling the contract; not a promise merely assuming the consequences of a deficiency. All the doctrines of insurance law pronounce the contract void after the condition or warranty is broken. A different rule as to warranties in insurance would defeat all the protection afforded by them, from the want of connexion, control or knowledge by the insurer in respect to the property insured while absent on the voyage. The only exception, if any, is where the ship having been unseaworthy, has been made seaworthy before the loss. *Weir v. Aberdeen*, 2 Barn. & Ald. 320. See *Hughes*, 269, 270. A deviation has

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the effect of discharging the contract, and not merely of throwing consequences on the insured. So of misrepresentation or concealment. 1 *Phil. on Ins.* 110. So of any breach of warranty. *id.* 127, and cases cited.

IV. The inability of the master at St. Thomas, to procure the necessary funds, was not a valid cause of abandonment. See *Peale v. Mer. Ins. Co.* 3 *Mason*, 65. 2 *Marsh*, 562. *Hughes*, 387. 1 *Phil.* 389.

1. Because such inability arose from culpable neglect and remissness in sending the vessel on the voyages without funds, without credit, and without the ordinary resources afforded by the freight. *Van Buren v. Wilson*, 9 *Cowen*, 168.

2. Because this inability is a circumstance merely personal to the party in the adventure, and does not grow out of the perils of the sea, or any thing connected with the usual course of trade on which the contract is based. Sale of cargo for necessities of the vessel, is not a loss for which the insurer is responsible. *Hughes*, 219, 220.

3. Because such a rule would make the same extent of loss, in a vessel of the same value and at the same port, a ground of abandonment, where the insured had withdrawn all his funds and had no credit: and no ground of abandonment where the insured had funds or credit: and thus introduce a capricious inequality.

4. Because, the rule being settled, that where the repairs are practicable, the vessel is not deemed subject to abandonment unless the repairs (deducting one-third new for old) exceed half the value of the repaired vessel; therefore it is the duty of the assured to retain and repair his vessel: his inability to discharge this duty is his misfortune or fault, and not that of the insurer. It is similar to the master's agency: if the vessel be damaged beyond half her value, he is agent of the assurers; if within half her value, of the assured. 1 *Phil. on Ins.* 468.

5. The rule "that the right of abandonment is to be judged of by all the circumstances of each particular case," is to be understood in relation to the circumstances of the property itself, and not to the circumstances of the insurer; and in relation to the various circumstances which have in law been heretofore

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held grounds of abandonment ; otherwise the rule becomes futile from its indefiniteness.

6. The rule contended for by the plaintiffs in error, contemplates only a reasonable obligation to provide some means for the vessel at the known ports of destination. And if the rule of abandonment now contended for applies at the port of destination, it will equally apply at the port of departure ; so that a trivial accident to a ship in the very port of the owner, would warrant an abandonment if he were insolvent.

7. The mere good faith of the master, in abandoning or selling his ship does not create a total loss, unless the circumstances upon which he acted of themselves were a ground of abandonment. *Patapasco Ins. Co. v. Ivrethgate*, 2 *Pick.* 26. 5 *Peters*, 621. 2 *Phil. on Ins.* 292.

*Points for the defendants in error :*

I. The nonsuit was correctly refused.

II. The charge of the court, that the inability to procure funds at St. Thomas was a sufficient cause of abandonment, was correct. 1 *Phil. on Ins.* 11. *Read v. Bonham*, 3 *Brod. & Bing.* 384. 1 *Bing.* 445. *American Ins. Co. v. Center*, 4 *Wendell*, 46.

III. The charge of the court, that if due diligence had been used to keep the vessel seaworthy she was covered by the policy, was correct ; and the judgment ought to be affirmed with costs. *Wier v. Aberdeen*, 2 *Barn. & Adol.* 320. *Hughes on Ins.* 269, &c. *Holdiworth v. Weir*, 1 *Man. & Ryl.* 673. *Paddock v. Frank. Ins. Co.* 11 *Pick.* 227, 233. 2 *Phil. on Ins.* 115. *Cotheal v. Jeff. Ins. Co.* 7 *Wendell*, 81.

After advisement, the following opinions were delivered :

By the CHANCELLOR. Two questions are presented for the consideration of the court in this case : 1st. Whether there was a breach of the implied warranty of seaworthiness, by the departure of the ship from Charleston, on her second passage after the commencement of the risk without providing a new anchor in

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the place of the one that was lost in going into that port ; and 2. Whether the master was justified in selling the vessel, for the want of funds to repair, in her third port of discharge after the commencement of the risk ; although the actual cost of repairs, at that port, deducting one third new for old, would, if the master had been furnished with funds or had possessed the ordinary means of obtaining them, have been less than half the value of the vessel as fixed by the parties in the policy.

The fact that the loss of the anchor rendered the vessel unseaworthy, even for the coasting trade, was not disputed on the trial ; although the damage which afterwards occurred to the vessel upon her passage from Norfolk to St. Thomas was, in fact, in no way attributable to the want of a second anchor. If upon a time policy, like the present, the implied warranty that the vessel is seaworthy, applies to the commencement of each separate passage during the continuance of the risk, even where such unseaworthiness has been caused by the perils insured against, then it was perfectly immaterial whether the master had or had not a reasonable excuse for leaving either the port of Charleston or the port of Norfolk without re-placing the small bower anchor which was lost upon the Charleston bar. On the other hand, if there was no such warranty of seaworthiness, then as the anchor was lost by a peril insured against, and the subsequent damage to the vessel at sea was in no way caused by the negligence of the master in not procuring an anchor previous to his departure from Norfolk, the question whether the anchor could have been procured with reasonable diligence does not appear to have been a proper subject for the consideration of the jury ; or at least the underwriters could not complain of that part of the charge which related to the excuse of the master for not supplying himself with a new anchor. Departing from the port of Norfolk in an unseaworthy state, either with or without excuse for not supplying the loss of the anchor, might have deprived his owners of the benefit of an insurance, for that passage, upon the freight and might also have rendered them liable to the shippers for any damages sustained by the latter if the shingles

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had been lost and the policy upon such cargo had been avoided on account of the unseaworthiness of the vessel. But if there was, as between the owners of the vessel, and the underwriters upon this time policy thereon, no implied warranty of seaworthiness for this particular passage, in reference to this damage, sustained upon a previous passage by one of the perils insured against, the underwriters could only be discharged from their liability on the ground that the subsequent damage or loss either certainly was, or that it might possibly have been, caused by the negligence of the master, in not using due diligence to render his vessel seaworthy after the previous accident; and not where as in this case, it is evident that the subsequent loss or damage must have arisen from other causes exclusively.

In ordinary cases, the implied warranty of seaworthiness only applies to the commencement of the adventure, or risk, and not to any intermediate port of destination during the continuance of the adventure, or voyage, unless such unseaworthiness is caused by some accident or peril not covered by the policy. And if the warranty is complied with at the commencement of the voyage, or risk, and the vessel is afterwards injured and rendered unseaworthy by a peril insured against, it is only necessary that the master should use reasonable diligence to put her in a proper situation to proceed on her voyage; and where there has been negligence on the part of the master in this respect, the underwriters are only excused from the payment of the subsequent damage or loss which may have been caused or sustained, by the want of such due diligence. *Peters v. The Phoenix Ins. Co.* 3 Serg. & Rawle, 25; *Paddock v. The Franklin Ins. Co.* 11 Pick. 227. It is supposed, however, by the counsel for the plaintiffs in error, that these principles are not applicable to an insurance upon a time policy; that such a policy is in the nature of a separate insurance upon each voyage or passage which is undertaken by the assured during the continuance of the risk: and that the underwriter is not liable upon his policy if the vessel is not seaworthy at the time of her departure from each port or place of destination, in the course of her business,

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during the continuance of the risk ; although the subsequent damage or loss is in no way attributable to such unseaworthiness. If this is the legal construction of a time policy, then it is certain that the underwriters are not liable for the loss in the present case, as this is a time policy in the broadest sense of the term. It was a policy upon the vessel only, for six months from the 17th November, 1829 ; without reference to the port or place where she then was, or any port or ports of departure or destination, or any particular voyages or passages upon which she was to be sent during the continuance of the risk. It does not appear by the evidence where the vessel was at the commencement of the risk ; although it may be fairly inferred therefrom that she was either in the port of New-York, or at some of the stone quarries in the neighborhood, as she sailed from that port for Charleston about a week afterwards, with a full cargo of stone, fully manned and equipped, and perfectly seaworthy for that voyage or passage.

Much may undoubtedly be said in favor of applying the principle of an implied warranty of seaworthiness in a policy upon a vessel on time merely, to each successive passage or voyage during the continuance of the risk, where the unseaworthiness at the commencement of the second or subsequent voyage or passage had not been caused by the perils insured against ; as the assured ought not to be tempted, in any case, to risk the lives of the crew or the property of others unnecessarily, by putting out to sea without taking all the usual precautions to guard against accidents. But it is a well known fact, that various opinions exist in different places as to what is necessary to render a vessel perfectly seaworthy, and what would be deemed requisite by the customs of one port or country, might not be required by the customs of another. Neither public policy or the interests of commerce, therefore, require the extension of the principle of implied warranties upon marine insurances, in this respect, farther than they have been carried by the courts of this country and of England, in previous cases. I have not been able to find any case in which it has been held that a time policy differed from an ordinary policy upon a voyage to different ports, where



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there was an insurance upon the vessel for the entire voyage or adventure, so far as regards the warranty of seaworthiness ; on the contrary, there are cases, both in this country and in England, in which it has been held that upon a time policy, where the implied warranty of seaworthiness was complied with at the commencement of the adventure or first voyage or passage, the underwriter was not discharged from the payment of damages accrued subsequent to an injury which rendered the vessel unseaworthy, and which had not been fully repaired the first opportunity. Thus, in the case of *Brooks v. The Oriental Ins. Co.* 7 *Pick.* 259, which was a time policy much like the present, where the vessel was insured for twelve months, from Salem to any port or ports on the globe, one or more times, and the vessel, on one of her passages from Boston to Brazil, was disabled by the perils of the sea, the assured was permitted to recover for subsequent damage to the vessel by the risks insured against, although she had not been fully repaired, so as to render her again seaworthy, at either of the ports of Bahia, Havana or New Orleans, to which ports she successively went, in the course of her trading voyages, after the first disaster which rendered her unseaworthy. And in the recent case of *Hollingworth v. Broderick*, which came before the court of king's bench in England in May, 1837, 1 *Lond. Jurist*, p. 430, in an action upon a time policy by the assured against the underwriter, the defendant pleaded in bar of the action that subsequent to the policy, and before the loss, the ship became broken, damaged and unseaworthy, and that by care and diligence, and with little expense, she could have been rendered seaworthy, but that the assured neglected to make such repairs, by reason whereof she remained unseaworthy until the time of the loss. And, upon demurrer to this plea, Lord Denman and the other judges of that court held that the plea formed no defence to the action, as it was not averred that the vessel was lost in consequence of such unseaworthiness ; and that the implied warranty only applied to the commencement of the adventure or risk. I am satisfied, therefore, in the present case, that the assured were entitled to recover for the subsequent damage to the vessel, although she had been previously rendered

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unseaworthy by the loss of the small bower anchor, and continued so unseaworthy at the time of the disaster, upon her passage from Norfolk to St. Thomas. It only remains to consider whether the underwriters were liable for a *total* or only for a *partial* loss.

The insurance by this company was upon three-fourths of the vessel only, and valued at \$1,800; the whole vessel therefore, was valued at \$2,400. And if this is, for the purposes of the policy, to be taken as her real value in ascertaining whether she could have been repaired for less than one-half her value, deducting one-third new for old, then there is no pretence that the assured had a right to abandon on that account; as the very highest estimate of repairs at St. Thomas was but \$1,700. That sum, after deducting one-third new for old, would leave the cost of repairs but \$1,133.33, or less than half the value as stipulated in the policy. I am aware that in the case of *Peale v. The Merchants' Ins. Co.*, 3 *Mason's R.* 27, Judge Story, whose opinion is entitled to great weight upon a question of insurance, held that the value of the vessel as agreed upon by the parties, and inserted in the policy, was not to be taken as the true value in determining whether the repairs would exceed half her value, in reference to the question of abandonment. He also decided in that case that in determining the same question, the deduction of one-third new for old was not to be made from the estimated amount of the repairs. In the first insurance cause which came before me as a circuit judge, I followed his decision as to the first point, but not as to the last; although I had at the time some doubts as to the correctness of his decision upon both points. But as the counsel for the assured, in whose favor I decided the first question, were not willing to risk their client's cause upon the correctness of the decision in the case of *Peale v. The Merchants' Ins. Co.* on that point, they waived the benefit of the decision in their favor, and consented that the valuation of the vessel, as contained in the policy, should be considered as her true value upon the

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question of abandonment. That point therefore was not before the superior courts of this state when the case afterwards came up for review upon other questions which arose at the trial. But when the case was before *this court*, I availed myself of that opportunity to say, that subsequent investigation and reflection had not weakened the doubts which I had previously entertained as to the correctness of Judge Story's opinion upon the question as to the valuation in the policy. I was not, however, aware even at that time, that the judgment or decree in the case of *Peale v. The Merchants' Ins. Co.* had been reversed upon the question of jurisdiction, or at least that it had found its way again in the state courts, and that the decision of Judge Story upon many of the points involved in the cause, had not been sustained. It now appears that the supreme court of Massachusetts has expressly overruled his decisions in that case, not only as to the deduction of one-third new for old, so as to settle that question in conformity with the reported decisions of the courts in this state, but also as to the conclusiveness of the valuation in the policy; in which decisions of the state court I most fully concur. Upon this last question, it appears to be impossible to add to the strong and conclusive reasoning of Putnam, J. who delivered the opinion of the supreme court of Massachusetts in the recent case of *Deblois v. The Ocean Ins. Co.* 16 Pick. R. 312. He says, "In regard to the value, we must recollect it was fixed by the agreement of the parties. It is admitted that if the vessel were absolutely lost when returning to her home port, after a three years' voyage and essential deterioration, the value in the policy should be paid. And we cannot perceive any good reason why that value should not govern as well when the assured claims for a technical total loss as when he claims for a loss by the total destruction of the ship; and why it should not govern when the assured would lose, as well as when he would gain by it. It seems to us that we should have just as much right to set aside the valuation if the vessel should be burnt, or otherwise actually destroyed, when she had become deteriorated in value,

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as to say that it should be set aside in the decision of the question whether or not a technical total loss had happened. If in the case of the utter destruction, the underwriters would not be permitted to prove that she was not worth half as much when she was lost as when the voyage commenced, why should the assured be permitted to prove that she had deteriorated to that extent in order to make an abandonment as for a technical total loss, which could not be otherwise maintained? It would, we think, be making a new contract, which would be essentially different in point of mutuality. If the vessel sustained damage at a time when she was in great demand the owner would repair her. If at a place where there was an embargo and where vessels were of comparatively little value, then he would work up her repairs to more than half her value in the market there, claim for the whole, and throw the vessel upon the underwriter. Wreck or not, total or partial loss, would depend upon the ever shifting state of the market, and not, as it should, upon the condition of the ship. She might be almost worthless at the place where she was damaged, and in another, perhaps not a distant port, would sustain a fair and reasonable value. To avoid these and other uncertainties and causes of litigation and dispute, the parties agreed upon the valuation in the policy. It was to continue the same although the vessel should grow worse. It was to continue the same wherever she might go under the policy, although she might, in some places, be worth more and in some places less than the value agreed upon. It was to be co-extensive with the voyage, as to time and place." To what has been so well said on this subject, by another, I will merely add, that by adhering to the valuation of the vessel as fixed by the parties in the policy, much litigation will be prevented, which is generally a serious injury to the assured. He will then have a fixed and certain rule by which to ascertain and determine his right to abandon, upon a mere computation, after he has ascertained the amount of repairs which will be required fully to restore the vessel to the state she was in previous to the disaster, by a regu-

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lar estimate and survey by competent persons at the port of necessity. Such a mode of ascertaining the right to abandon will generally prove satisfactory to underwriters; and will enable them, at once, to determine whether to accept or to reject the abandonment. But if the valuation of the vessel in the policy is to be departed from, and the actual value of the ship at the port of necessity is also to be ascertained from the uncertain and conflicting opinions of persons remote from both parties, before the underwriters can determine whether they will accept or reject the abandonment, the assured must, in the end, be the principal sufferer by the delay and litigation, which must arise from such a departure from the rule of value adopted by the parties themselves. I therefore think the value of the vessel as fixed upon by the policy should be considered as conclusive between the parties, in determining the question whether the extent of the injury was such as to authorize an abandonment as for a technical total loss; as it is for the purpose of ascertaining the amount which the assured is to recover for the loss of his vessel if he succeeds in turning it into a technical total loss. And there was no evidence in the present case which could authorize the jury to find a verdict in favor of the assured for a total loss on the ground that the expense of repairs would exceed the half of the value of the vessel, within the meaning of the legal rule on that subject.

The rule of permitting the assured to abandon when the vessel has been injured to more than half the value, does not exist in England. It was first adopted in this country from a similar rule, in relation to an insurance upon the cargo, in some of the other maritime countries of Europe; and among others, in France, according to Pothier. See *Cleria* 278, *Le Guidon De La Mer*, ch. 7, § 1; *Pothier Traite Du Cont. D'Assur.* No. 118. And it is now adopted as a part of the maritime law of France in terms, by the more recent commercial code of Napoleon; except that the new code requires that the loss should be at least three-fourths of the value of the property assured, to authorize an abandonment on that account. *Code de Com. art. 369.* As this principle of adopting an arbitrary rule of proportion, between

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the value of the vessel, and the expense of repairing her at the port of distress, for the purpose of ascertaining the right of the assured to abandon as for a total loss, was substituted for the more uncertain rule which exists in England, of leaving it to the jury to determine, as a matter of fact in all cases, whether the situation of the vessel was such as to make it a justifiable case of abandonment, or of a sale of the ship for the benefit of all parties, the courts of this country should be cautious how they depart from the established rule, or they will find the underwriters and the assured again involved in the ruinous litigation, which the adoption of a fixed and certain rule was intended to obviate. I agree that there may be cases, where the vessel is stranded, with partial wreck, or is rendered otherwise innavigable at a distance from any regular port, and where the means of repair or the necessary funds for that purpose could not have been procured, even if the master was furnished with the ordinary powers to obtain them, in which, from the necessity of the case, there must be an abandonment or sale of the wreck of the ship. *Pardessus* admits that such cases may exist even under the present commercial code of France; the 390th article of which declares that an abandonment on the ground of incapacity to navigate, cannot be made if the vessel stranded (*echoue*) may be gotten off, repaired, and put in a state to continue her course to her place of destination. *Pard. De Droit, Com. part. 3, tit. 5, ch. 3, § 4, n. 842. Tome 3, p. 370.*

In the case now under consideration, however, there was no impossibility of repairing the vessel, as in the case put by *Pardessus*, on the ground that she was in a place where there was no money to borrow, or workmen or materials to be procured on credit, to make the repairs. Here the vessel was in one of her regular ports of destination, with her cargo on board when she arrived in a disabled state; the impossibility, if any, of procuring funds on credit to make the repairs, arose from the fact that the master, either by his own fault, or by the improvidence of his owners, was not only deprived of the benefit of his and their personal credit, but was divested of all the other means,

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except the vessel itself, which the law places under his control, for the repair and preservation of the ship. I therefore concur in the opinion expressed by Mr. Justice Bronson in the supreme court, that this was not a proper case for converting what was in fact only a partial loss into a total loss, for the purpose of charging the underwriters with a greater amount than they ought to be compelled to pay, according to the terms of the policy, and giving to the assured a greater sum in damages than in justice and equity they ought to recover. It may be proper to remark, that the part of the decision of Judge Story, in the case of *Peale v. The Merchants' Ins. Co.*, which is relied upon by the two members of the supreme court, who differed in opinion with Mr. Justice Bronson in this case, has not been sustained in the state of Massachusetts, in the subsequent cases which arose on the same or similar policies on that vessel; and in some more recent decisions in the supreme court of that state. The principle of submitting it to a jury in each case, to decide what a prudent owner would do for the purpose of determining the right of the assured to abandon, would necessarily lead to ruinous litigation, and would deprive both the insurers and the assured of all the benefits intended to be secured to them by the adoption of the rule as to the extent of the repairs exceeding half the value of the vessel. It appears to me to be wholly inconsistent with reason and justice to permit both rules to stand together. The question as to what a prudent owner would do, may be a very proper rule of decision in a case of stranding, and before it is known whether the vessel can be gotten off, or what injury she has sustained or may sustain in her then situation; and the other rule cannot be applied to such a case. But the adoption of such a principle in other cases, where the vessel is safely moored in a regular port, would probably have the effect here, as it already had in England, of compelling underwriters to insert a stipulation in the policy that there shall be no abandonment except in case of capture or detention, or where the vessel is stranded. I will only add, that I fully concur in the reasons urged by Mr. Justice Bronson against the conclusion at which his brethren had arrived in this

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case. I think, therefore, that the judgment is erroneous, and should be reversed ; and that a *venire de novo* should be awarded, to enable the assured to recover his actual damages as for the partial loss only.

By Senator VERPLANCK. There are two distinct heads of examination presented in this case, both of them of great interest to our commerce and navigation.

The first question is, how far does the warranty of seaworthiness of a ship extend ? Or, in other words, in an insurance on time, either for a fixed period, as here, or for a circuitous voyage touching at several ports, or out and home : does this warranty apply or not, as a condition precedent at every successive port, so that any breach of it, after the voyage is begun, vacates the contract, and discharges the underwriter from all subsequent losses, even when not attributable to that particular breach ?

I concur with the decision of the supreme court on this branch of the cause, and hold that the warranty of seaworthiness as a condition on which the whole contract depends, is fully complied with, if the vessel is seaworthy when the risk commences ; that, therefore, the fact of the vessel not having been afterwards properly refitted as to any particular damage, at an intermediate port, does not discharge the insurer from subsequent risk or loss, not consequent on such defect. I need not recapitulate all the cases stated or cited in the arguments before us, or in the opinion of the supreme court. That of *Holdsworth v. Weir*, 1 *Man. & Ryd.* 671, I think is quite decisive of the English doctrine. It had been strongly contended in that cause, that the warrant of seaworthiness implied seaworthiness at every successive port of a circuitous voyage covered by one policy. The court of king's bench were unanimous in the opinion, "that the warranty did not extend so far as to require seaworthiness at every port from which the ship might depart in the course of the voyage." Among the American cases, that of *Peters v. Phoenix Ins. Co. 3 Serg. & Rawle*, in the supreme court of Pennsylvania, is especially clear to the same point. The decisions in many other



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causes involving this question, are to the same effect, though sometimes with less precision of language in the reasoning of the courts. The whole doctrine established or recognized by the cases is this: Any breach of the condition of seaworthiness at the commencement of the risk, discharges the entire responsibility of the insurer, whether the loss incurred be in any way the consequence of such special defect of seaworthiness or not. It is an obligation *strictissimi juris*; it goes to the foundation of the contract, and is to be complied with strictly on both sides; but when the contract once attaches, it has no further obligation. Any defect of seaworthiness arising afterwards from bad faith, or want of ordinary prudence or diligence in the owner or his agents, discharges the underwriter from liability for any loss occasioned by, or the consequence of, such want of faith, prudence or diligence; but from no others. It does not affect the contract as to any other risk or loss covered by the insurance, and not caused or increased by such particular defect.

There is, however, a looseness of language in the *dicta* and reasoning of some of the cases on this point, which has led to a corresponding confusion in the books, see 1 *Phil. on Ins.* 117, 2 *id.* 114, 119, and some doubt as to the law. It seems to me to have arisen from confounding the express warranty of seaworthiness at the time of making the insurance, which is the warranty of a *fact* within the knowledge of the assured, with the implied warranty of due diligence, which is the subsequent *duty* of the assured. The first is a stipulation as to a present fact, always required and understood as a condition precedent, on which the contract depends; and when that is executed, the contract attaches, and the assured has fully performed that part of his stipulation. But there cannot possibly be an implied warranty of the fact of unbroken and continual seaworthiness, for that would be in contradiction to the very object of the policy, which is to insure against perils and damages, such as must occasionally render the vessel not seaworthy. But there is another implied warranty, beginning when the condition precedent of the

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*fact* of seaworthiness ends. It is that of the future discharge, of the assured's *duty* to the insurer, of his good faith, ordinary prudence and due diligence in the management, care and repair of the vessel. This pervades every part of the law of insurance and every contract formed under it, and the assured takes upon himself the consequences of every breach of such duty. In the words of Lord Mansfield, 1 *Burr.* 341, "If the chance be varied by the *fault* of the owner, the insurer ceases to be liable, because he is only understood to engage that the thing shall be done free from fortuitous danger, provided due means were used by the trader to attain that end." When this duty and these "due means" are neglected, and *so far as they are neglected*, the owner discharges the insurer from all the consequences of such neglect, and takes upon himself the risk of every defect of seaworthiness, proceeding from his own or his agent's negligence or misconduct, but no more. The contract is still good in relation to every point in which he has not, by negligence or misconduct, made the risk his own. Such is the distinction that I draw from comparison of the numerous cases. It is, I believe, well settled law, and will be found to harmonize all the *decisions*, though perhaps not all the *dicta* of the courts. I have gone more fully into the consideration of it, because it has no small bearing on the second question of this case, as well as being decisive of the head now under examination. To apply this doctrine to the facts of the present case. The vessel was seaworthy at the beginning of the risk, and the warranty of that fact complied with; so that the contract of insurance attached. There was an apparent want of due diligence and ordinary commercial prudence, in not providing an anchor at one of the intermediate ports in place of the one lost; and this want of diligence, if proved, would have discharged the underwriter, had the loss in question been attributable to the want of the anchor. But the damages occurred from other causes, with which the having or wanting an anchor had no perceivable connexion. The contract of insurance, therefore, not having been varied, or the risk increased, as to the particular

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peril and loss actually encountered, remains in force, and the insurer is liable for the actual loss.

II. The facts presenting the second question in this cause are these :

The vessel, on her voyage from Norfolk to St. Thomas, a port of her destination, encountered severe weather, and arrived greatly damaged. The cost of repairs necessary to put her in condition for a return voyage was variously estimated, but there was no evidence to show that the damage amounted to half the value of the vessel ; and the regular survey estimated the cost of such repairs at about one-third of the sum at which she was valued in the policy. There were no funds whatever to meet this expense in the hands of the consignees or the master, nor could any credit be obtained for the vessel. The whole amount of freight earned by the voyage was absorbed by protested bills for the original outfit from New-York, returned on the master, and the vessel was thus left without either funds or credit for the daily supply of the crew. An attempt was made to raise money on bottomry, which failed. Finally, the master determined to abandon the vessel, and she was accordingly sold. The proceeds of the sale were just sufficient for the payment of the crew's wages, the expenses at St. Thomas, and the master's passage home. There is no doubt of the master's good faith, and of the necessity of the sale ; but the question is, whether that necessity (arising, as it did, from want of funds and credit,) is sufficient to authorize an abandonment, and to charge the insurers with a constructive total loss.

On this head I am constrained to differ from the majority of the supreme court, (as well as from the superior court of law of the city of New-York,) and to concur with the dissenting judge, Mr. Justice Bronson, that the judgments below should be reversed.

The doctrine of abandonment for a constructive total loss, as has often been said, is a deviation from the strict contract of indemnity, which is all that the policy bears on the face of it. It ought not, therefore, to be extended by mere inference or impli-

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cation, to impose any liability beyond what well settled legal decision and known commercial usage have made the necessary though implied conditions of the contract. Commercial usage, as acknowledged, evidenced and explained by judicial decision, has pretty well settled the external circumstances, under which a loss, though partial in itself, shall be deemed total as against the underwriters, so as to authorize an abandonment as part of their contract. Our own peculiar usage authorizes such abandonment, when the damages amount to more than half the value of the vessel. This seems to have been drawn from the old French law, in opposition to that of England, which makes no similar allowance, as well as that of modern continental Europe, which requires a damage of three-fourths of the value. The other grounds of abandonment are well stated by Judge Story, *Peale v. The Merchants' Ins. Co.* 3 *Mason*, 65, who, after reviewing all the previous cases, sums up the whole by saying, "If there be any general principle that pervades and governs the cases, it seems to be this: that the right to abandon exists, when the ship, for all the useful purposes of the voyage, is for the present gone from the control of its owner, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant, or the risk and expenses are disproportionately to the objects of the voyage." To the same effect the law is stated by Chancellor Kent: "It is a constructive loss, if the thing insured, though existing in fact, is lost for any beneficial purpose to the owner." 3 *Kent's Comm.* 318. Here, all the external circumstances give evidence of a case, where the vessel "was lost for any beneficial purpose to the owner;" and, in Judge Story's words, "for any useful purpose, gone from his control." He had therefore a clear *prima facie* right to abandon. But, on the other hand, it is equally clear to my mind, that the insurer has a right to look behind that *prima facie* right, just as he has in regard to an actual loss, and to inquire into its cause. To me it seems self evident, that the liability of the underwriter for a constructive total loss must be governed and limited by the same principle with his liability for an actual total

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loss. If, in the case of an actual loss, he is discharged from liability by tracing the cause of that loss to the negligence of the owner or his agent, why is he not also freed from the responsibility of a constructive or technical total loss, if he can show that the necessity which is the *prima facie* ground of an abandonment, however real, was yet the result of culpable negligence? To both cases, the broad rule so well stated in the simple language of Lord Mansfield, 1 *Burr.* 341, is equally applicable, "the insurer ceases to be liable, because he is only understood to engage that the thing shall be done free from fortuitous danger, provided due means are used by the trader to attain that end." Thus, again, in a more recent leading case, *Tait v. Levi*, 14 *East*, 481, where a loss occurred by the captain, through ignorance, taking his ship into a wrong port, it was held that this was a failure of the implied warranty that a captain of competent skill should be provided. Lord Ch. J. Ellenborough said, "There was gross negligence in sending a captain so totally ignorant of the coast;" and this negligence discharged the underwriters from an actual total loss. If, then, gross negligence, or want of due diligence as to any of the warranties, express or implied, of the conditions precedent or subsequent, would have discharged the insurer in this case from the loss actually sustained by perils of the sea—if he could have shown such loss to be the consequence of such negligence—I can see no color of reason why he should not have the same right to inquire into the cause of the necessity, which is claimed as good ground of abandonment; and if that arose from gross negligence, to free himself from the responsibility for a constructive total loss. On the contrary, it seems to be a necessary consequence of that great and broad principle of our insurance law, which binds the owner to good faith and due diligence, and makes him bear the loss consequent on any neglect of such duty, that the right of abandonment must be forfeited by the same sort of gross negligence as to providing means for the resumption of the voyage, which, in case of an actual partial loss, would have forfeited the right of recovery against the insurers. I infer, then, that if the *absence of funds or credit* to enable the

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master to repair his vessel in a port of destination, was caused by negligence in the owner, that such negligence forfeits the right to abandon to the insurers. This is to be distinguished from the doctrine broadly stated and denied by the supreme court, "that the inability to procure funds to repair, or, in other words, the inability to repair the ship, was not a good ground of abandonment." This I do not maintain. On the contrary, I can imagine many cases, when even in a port of destination, sudden calamities, war, pestilence, bankruptcy of consignees, or the peculiar character of the place, as in a half civilized country, might exempt an owner from any charge of want of ordinary prudence and diligence, under circumstances otherwise similar to the present. My position is simply, that an inability, whether to repair or procure funds to repair, arising from such gross negligence of the owner as would have discharged the insurer from any actual loss thence resulting, discharges him also from constructive total loss, and takes away the right of abandonment. The inference of this rule from the general principle appears to me so close and so necessary, as not to admit of any chain of argument to allow of any further elucidation, or to require any authority. To deny it, is to say that the owner may, by his wrong or negligence, gain an advantage to himself at the expense of his insurer, such as he could not have gained by a strict and faithful compliance with the terms of his contract. It is to produce perpetual doubt and uncertainty in every similar case, and thus to introduce a new "element of discord," in addition to those which Judge Story has eloquently deplored as already existing in the law of abandonment.

The rule, as I have stated it, is in strict accordance with the principle stated by Phillips, and laid down in *La Guidon de la Mer*, "that the underwriter does not run the risk of the obstructions occasioned by the debts, misconduct, insufficient acquittance, or neglect to pay debts of the assured." 2 *Phil. on Ins.* 179. It rests on the very same reasons with the decision in one of the most respectable courts of our Union, that when the assured, by mortgaging his ship, deprives himself of the power

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of transferring the title, he cannot, by abandoning her, recover against his underwriters for a constructive total loss ; *Gordon v. Mass. Ins. Co.* 11 Pick. 249 ; where Chief Justice Parker said, "This is one of the cases in which the insured cannot claim a total loss by virtue of an abandonment, because by reason of the transfer, *he had disabled himself from putting the underwriters on the footing which they had a right to expect in case of a loss.*" It rests, too, upon the same ground with that well settled and familiar doctrine, *see 1 Phil. on Ins.* 115, and cases there cited, that the insurer is not answerable for losses occasioned through the fault of agents employed by the assured ; and the reason assigned by Judge Le Blanc in one of those cases, *Bell v. Carstairs*, 14 East, 382, applies with equal force to the case of neglect in providing funds or credit. "If a loss happened for the want of that which the assured ought themselves to have provided, it could not have been within the intention of the parties, that the insurer should be liable." The authority is strongly to the point of the present analogous case, and the reason seems to me conclusive as to both classes of neglect.

Such being the general rule, it remains only to inquire what it is that would constitute gross negligence in the ship owner in providing necessary funds, so as to prevent the inability of procuring them from being a valid ground of abandonment ; and how the doctrine applies to the case now before us.

I think we are here warranted in charging the inability to the want of due diligence. I have before stated cases, in which mere inability to raise funds, even in a port of destination, could not be reasonably imputed to any culpable negligence. An unexpected bankruptcy of a consignee, especially if connected with any general prostration of credit, and the necessity of large and expensive repairs beyond ordinary calculations of danger ; the effects of any wide, wasting and general calamity at the port of destination, such as pestilence, or siege, or capture ; these and other contingencies might render that impossible, which, under usual circumstances, would have been but the ordinary arrangement of any prudent merchant. Again : the character of the

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port itself must modify the degree of expected diligence. The want of funds which, under the same circumstances, would be wholly inexcusable in a port of the United States, or of Europe, or her colonies, might be a matter of necessity in a port of Cochin China, or the coast of Africa. It is, therefore, difficult to lay down in precise words, any universal rule, as to the duties of an owner and his agents, in providing funds or credit to meet unexpected emergencies, the neglect of which should make him responsible for those losses which otherwise would have fallen elsewhere. Negligence is a relative term, and as is said by the books, in relation to the general doctrine of abandonment, "the right of the parties is to be judged of by the circumstances of each particular case. 3 *Kent's Comm.* 322. But the general principle is clear. The obligation of the ship owner must be the same with that of the *bailee for hire*, or of him who takes charge of goods or property in consequence of some lucrative contract, as they are classed together by Sir William Jones. In consequence of the mutually beneficial contract of insurance, the owner and his agents are intrusted with the interests of the insurer, so far as he may be concerned. But the general rule that governs all such contracts of bailment, and applies to all the analogous cases in the law of shipping and of insurance, makes the party so intrusted chargeable with *ordinary neglect*, which is defined by Sir William Jones as "the omission of that care which every man of common prudence takes of his own concerns," *Law of Bailment*, 118; or to take the rule of our American commentator, who has analyzed the same subject with still greater legal learning and not inferior talent, he must exercise "that common prudence which men of business and heads of families usually exhibit in affairs interesting to them." *Story's Law of Bailment*, p. 8. The mechanic who, in consequence of a mutually beneficial contract, has under his charge the materials of his employer, the master who in like manner has control of the property of his owner, and the owner who has confided to him the interests of his insurer, must alike exercise a care, diligence and skill, adequate to the business, for the neglect of which they are all responsible, whilst they are not



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- answerable for slight neglect or mistake, or for loss by an inevitable accident. Now, what is ordinary diligence, or duty in respect to the providing funds in a port of destination, has been well defined by Judge Sutherland, in *Van Buren v. Wilson*, 9 Cowen, 168, "It is the duty of the owners to furnish the master of a vessel with the means of obtaining all the credit which the exigencies of a voyage may require." And on this ground the court in that case decided that the wages of seamen, which depend commonly on the earning of freight, and are lost when the freight is lost by disaster, can be recovered against the owner when freight is lost by his neglect; under which head of neglect, that of negligence in furnishing his vessel with funds or credit, was there expressly placed. It is true, as said by the chief justice in this cause, that this was not in an action between the insurer and insured, but in one for wages by seamen against their ship owner. But the question of the duty and nature of due diligence towards those whose interests depend upon it, is the same in both; nor can I see any reason whatever to distinguish as to the responsibility incurred. To regard the law of insurance as standing entirely on its own insulated ground of precedent and authority, uninfluenced by the more general rules of jurisprudence, and unaffected by analogy to other parts of the law of contracts and commerce, is in hostility with its rational and scientific spirit, and in contradiction to the authority of Mansfield and its other illustrious expounders who have claimed for it the merit of being a science formed by deduction from reason and fixed principles; and not "merely an unconnected series of decrees and ordinances."

What the "ordinary exigencies" of a ship may be, which a ship owner of common prudence would guard against; and again, what might be the unexpected circumstances or contingencies that would excuse the want of funds or credit to meet the exigencies, must, as in innumerable cases arising under the law of bailment, of shipping, and of insurance, be judged of according to the case. The standard of seaworthiness itself varies according to the voyage or the time. Judge Story, in laying down the

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general rules of responsibility for due diligence in bailment, (which must also govern this special and peculiar sort of trust or bailment,) with all the lights, not only of profound learning, but of long judicial experience, is content to say that "diligence and negligence must be judged of by the habits of business, usages of society, and the customs of trade." Still, here, (as Judge Story says, regarding the more general rule,) the decision "may vary as to facts, but is uniform as to principle." It is culpable negligence to neglect the means of funds or credit in a port of destination, such as any ship owner of the commonest prudence would have used in the ordinary course of the same business. More than this cannot be demanded. It cannot be expected, for instance, in an adventurous and extensive trade, such as that carried on from our ports, that in a circuitous voyage, there should be provided funds or credit, secured in every port at which she may touch, to the amount of one-half the value of the vessel, to meet every possible exigency. On the other side, it seems to ask no more than the discharge of ordinary duty to the owner and all who are interested, and of ordinary good faith to the underwriters, if it should be required that the vessel, unless other funds were provided, should be unincumbered with previous hypothecation or other debts; that the freight earned should be free to meet all the wages and expenses legally chargeable upon it, and that the vessel should not be discredited in the eyes of her consignees and of those to whom resort for loans might be made, as to all future risks, by the general negligence as to the present one. As the master, in ordinary circumstances, carries with him in the vessel itself, a fund to meet unexpected difficulties, by his authority to raise money on her by sale or bottomry in case of necessity, that fund of last resort reserved for special exigencies, should not be discredited, or impaired by debts for wages or for ordinary expenses for which the freight is answerable, or for previous debts that ought to be discharged out of other funds. If the owner neglects this, our decisions will make him answerable to the seamen for wages; and on the same ground he must lose the right of abandonment for a necessity so caused, and look to

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his insurer only for the actual partial loss. Between the two cases just stated, there may be many degrees ; but these must be judged of as they occur, according to the case itself.

In the present case, however, there was no appearance of any sort of care, foresight, or diligence in relation to the subject. The master was not supplied, at any of the intermediate ports of lading, with the means of meeting the ordinary expenses of his voyage. He had no funds at any of them, and was even unable to obtain an advance of ten dollars from his consignee at one of these ports. The freight at St. Thomas, (a port of destination,) which was the natural fund for the payment of ordinary expenses and of wages, was exhausted by protested bills for the original outfit, which had been sent out from New-York. Every thing in the management of the business indicated negligence, and tended to impair that credit, which, had the ordinary expenses been met by the earned freight in the usual way, might perhaps have been obtained. It was a case not of ordinary, but of gross negligence ; there was an entire want of diligence, the natural consequence of which was a total inability to procure funds or credit for repairing the vessel.

Upon the whole view of the case, I come to the following conclusion :

1. That the vessel having been seaworthy at the commencement of the risk, any subsequently occurring defect of seaworthiness, does not discharge the insurers from any loss or damage not ascribable to want of due diligence, but they are liable for any loss not caused or increased by or in consequence of such negligence.

2. The broadly stated doctrine, "that the want of funds wherewith to make repairs, is a valid ground of abandonment," is not correct as a universal rule, but does apply to all cases where such want is chargeable to the defect of ordinary diligence or good faith, on the part of the assured or his agents.

3. The particular circumstances of the case showing a total want of ordinary care and prudence, in relation to funds or credit, the inability to provide such funds or credit to repair the

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vessel did not authorize an abandonment so as to charge the underwriters, however necessary or proper the sale of the vessel by the master might have been in regard to other interests; and that therefore the charge of the learned chief justice, "that the inability of the master to procure funds at St. Thomas was a valid ground of abandonment," was incorrect.

I am accordingly of opinion that the judgments of the courts below should be reversed, on the grounds last stated.

By Senator WAGER. It is contended on the part of the plaintiffs in error, that the judgment below ought to be reversed, principally for two reasons: 1. Because the warranty of seaworthiness extending to the whole contract of insurance, it attached as a condition at *Charleston* and *Norfolk*; and was broken by sailing from those two ports without a small bower anchor which was lost on the bar off Charleston, thus leaving the vessel as was admitted on the trial, unseaworthy; and 2. Because the inability of the master at St. Thomas to procure the necessary funds with which to repair the vessel, was not a valid cause of abandonment.

In relation to the first point, I mainly concur with the majority of the court who pronounced the judgment below. The implied warranty of seaworthiness attaches as a condition at the commencement of the risk, and not at *every port* at which the vessel puts in during her voyage. If she be seaworthy at the commencement of her voyage, the implied warranty is answered. *Hughes on Ins.* 272. The cases examined by me in relation to the warranty of *seaworthiness*, are all cases of insurance for a particular voyage. As the case on argument is an insurance upon *time*, during which the vessel might perform two or more principal voyages, I was at first inclined to the opinion that a difference would be found in the books in relation to its application to the different policies. I supposed that the same rule which raised an implied warranty of seaworthiness as a condition to a policy for a particular voyage, would annex it also as a condition at the ports of departure of every principal voyage,

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performed during a policy upon time ; and it does seem to me that such an application of the rule would promote the ends of justice, but as I have not been able to find any such application of it in the books, and as it is unnecessary to decide the point, in coming to a conclusion to reverse this judgment, I forbear expressing a decided opinion upon it. Where the insurance is for a particular voyage, a breach of the condition avoids the whole policy ; not so an omission of the insured, to keep the subject insured in a constant state of seaworthiness during the whole period of insurance. *Paddock v. The Franklin Ins. Co.* 11 Pick. 227. It is most undoubtedly the duty of the assured, to use all reasonable diligence to keep the vessel insured seaworthy during the voyage, and if she be lost in consequence of this omission of duty, the underwriters will not be held liable.

In the case under consideration, the vessel was not damaged in consequence of the want of her small bower anchor lost at Charleston. She was injured while at sea, and far from any port, where her anchors could have been useful to her. It is clear, therefore, that had the utmost diligence been used at Charleston and Norfolk, to supply the loss which had happened to her on the Charleston bar, it would not have obviated the dangers and damage to which she was subsequently exposed. If the injury sustained by this vessel had happened from want of anchors, I am far from believing that the evidence produced on the part of the plaintiffs below was sufficient to excuse the master from supplying the loss. The anchor was lost on entering the harbor at Charleston, where the vessel lay some five days, without any effort on the part of the master to supply it, save the understanding between him and the pilot, that he should endeavor to find it on the bar and raise it, for which he was to give him \$10. He saw the pilot on the morning on which he sailed, and then knew that the anchor was not raised. He nevertheless sailed out of port in the vain hope, that it would be fished up that morning and restored to him on his way out. He had no funds with which to purchase an anchor at Charleston ; the owners had not supplied him with any with which to defray his

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necessary expenses; he had no credit. How then could he be expected to replace the anchor? All this omission therefore to use due diligence, would be properly chargeable to the assured and the consequences visited upon them. At Norfolk the master used some exertion to procure an anchor, though he did not there conduct himself as a person would who had the ability, and desired to repair the defect in his ship.

The question of negligence on the part of the master was purely a question of fact for the jury, and had they been permitted to pass upon it without erroneous instructions from the court, their finding would have settled the point. But the court, in charging upon this point, took from them the question of negligence at *Charleston*, by instructing them that the material question was, whether the master made use of due diligence at *Norfolk* to obtain an anchor. Upon this point I think the court erred, and the judgment should for that reason be reversed, had the loss in this case taken place in consequence of the want of the anchor; but as this point is obviated by the rule above adverted to, it was perhaps unnecessary to say what has been said in relation to it. I shall therefore confine the further remarks I have to make, to the second point raised by the plaintiffs.

It may be difficult to conjecture what the verdict would have been, had the cause of abandonment been properly submitted to the jury. They would possibly have been justified in finding, under the circumstances proved, that it came within the rule laid down by Justice Story, in 3 *Mason*, 65: "That the right to abandon exists wherever, from the circumstances of the case, the ship for all the useful purposes of a ship for the voyage, is for the present gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain or unreasonably distant, or the risk and expenses are disproportionate to the expected benefits and objects of the voyage." But as this case was presented to them, they were precluded from inquiring into and determining upon the causes of abandonment which existed in the case. They were instructed that the inability of the master to procure funds at St. Thomas,

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with which to repair the loss, was a valid ground of abandonment. The rule was laid down so that the jury could not disregard it, though it should appear that the materials and means to repair might be easily had, and the work expeditiously done at a moderate cost, as compared with the value of the vessel. The verdict of the jury upon this point rested, under the charge of the judge, upon the sole ground of the inability of the master to raise the necessary funds to defray the expense of repairing. The majority of the supreme court, erroneously, I think, seem to regard the inability of the master to procure funds, as equivalent to a *general inability* on his part to make the necessary repairs in that port. If this were so, the abandonment would have been justified, under the several decisions on which the court relied. But an examination of those decisions will show, that the vessels abandoned were so situated, that the difficulty and almost impossibility of repairing within a reasonable time, so as to enable the assured to prosecute the voyage, rendered it expedient for the interests of the parties concerned, that the master should exercise his control over the ship, and abandon and sell her. Can it be said, or could the jury have found in this case, had the question been fairly presented to them, that if the master had possessed that credit and ability to raise funds to repair partial losses, which every prudent and discreet owner is bound by a due regard for his own interests, to see that those who act for him possess, in a port of destination, where her cargo is to be discharged, and where ordinarily the freight is to be paid, that the vessel could not have been repaired and put in a complete and seaworthy condition in a reasonably short period, and within the expense estimated by the surveyors at St. Thomas, which did not exceed one-third part of the value of the ship? The testimony shows that the vessel was hove out only about twelve hours at St. Thomas, which was all that was necessary to repair her bottom. The other repairs, though more expensive, were all easily accomplished. But it is unnecessary to discuss this point further, as the jury were not permitted to pass upon it. The cause turned



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solely upon the inability of the master to procure funds for reparation.

Chief Justice Savage, in the opinion delivered by him, supposes that the omission of the defendants below to put any question to the jury on the subject, is an admission of the good faith and necessity of the transaction, by which the master abandoned and sold the ship. Now I do not so understand the case, as it is presented to us. The jury supposed the necessity of abandonment grew solely out of the inability of the master to procure the necessary funds to defray the expenses of repairs, and that independent of that, there were no circumstances in the case which would enable the assured to turn a partial into a total loss. The second point presented by the defendant's counsel is in these words: "That plaintiffs were not entitled to recover a total loss, inasmuch as the expenses of repairs at St. Thomas, making the usual deductions, would not have exceeded a moiety of the valuation in the policy; and that the inability of the master to procure funds was not, under the circumstances, a valid cause of abandonment." They also requested the judge to charge the jury, "That St. Thomas being the port of destination, the inability of the master there to procure the necessary funds for repairing the vessel, supposing such inability to be proved, was not a sufficient ground of abandonment." These two positions show that the counsel for the defendants below understood that the only important question upon this point was that growing out of the inability of the master to procure funds.

As between the master and the owners, the sale of the vessel would have been perfectly justifiable; because it was the duty of the owners to see that the master had credit or means to keep the vessel in a navigable condition. But for this reason, to convert the master into an agent for the insurers, and by his act turn a partial into a total loss, would be extending the rule of abandonment much further than I think any of the cases have gone. It would, in my opinion, be dangerous in the extreme, and open the door to innumerable frauds upon insurers. Almost



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any partial loss might thus be converted into a total one. The inability to procure funds in a foreign port is an excuse, which might easily be framed, aided, as would be the master in framing it, by the avarice of those who might supply the funds, but who refuse a loan with a view to speculate upon the abandoned vessel.

The doctrine of abandonment for a technical total loss, having been engrafted upon the contract of insurance by a course of decisions, is now the law of the land, and those who come within the rule which led to its introduction, are entitled to partake of its fruits. But as it was introduced with doubt, and as the policy of it has since been much questioned, we are bound to see that it be not extended so as to produce injustice. The rule as laid down in this case by the judge who presided at the trial, would afford an entirely new ground of abandonment from any that can be found in the books, and would be dangerous as tending to frauds. I am therefore, for reversing the judgment below.

On the question being put, *Shall this judgment be reversed?* all the members of the court, with one exception, voted in the affirmative.

Whereupon the judgment of the supreme court was accordingly REVERSED.

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Allen v. Suydam.

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## S. &amp; M. ALLEN vs. SUYDAM &amp; BOYD.

An agent receiving for collection before maturity, a bill payable on a particular day after date, is held to strict *vigilance* in making *presentment for acceptance*; and if chargeable with *negligence*, is subject to the payment of all damages sustained by the owner.

Where the debt is lost through the *negligence* of the agent, the measure of damages *prima facie*, is the amount of the bill; the defendant is at liberty, however, to show circumstances, if any exist, tending to mitigate damages, or to reduce the recovery to a nominal amount.

ERROR from the supreme court. This was an action on the case, by Suydam & Boyd against S. & M. Allen, for *negligence* in omitting to present for *acceptance*, a draft for \$616.89, drawn by one John Eastabrook, at New-York, on W. W. & J. E. Eastabrook, a mercantile firm transacting business at Concord, New-Hampshire, in favor of the plaintiffs, bearing date 21st July, 1833, and payable two months after date. The draft was received by the plaintiffs on 16th *August*, 1833, and on the same day placed by them, for collection, in the hands of the defendants, who were to be allowed a commission of one per cent. The defendants retained the draft in their possession until 2d *September*, 1833, when they transmitted it to the cashier of a bank at *Concord*, who received it on the sixth day of the same month. On the *seventh* he called upon the drawees, and asked if they were ready to accept, and was told they were not; that they did not accept for the drawer without instructions, and had not received any instructions in respect to this draft, but expected to hear from the drawer in a short time. The cashier called again on the *tenth* day of September, and was then told by the drawers that they had been instructed by the drawer *not to accept* the draft, and that they accordingly should not accept; whereupon it was protested on the same day for non-acceptance, and returned to the defendants. The draft, on its return, was received on the *sixteenth* day of September, by the defendants, who on the

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same day sent it to the plaintiffs and demanded the receipt given by them on receiving the note ; but the plaintiffs refused to give up the receipt and take back the draft. On the *nineteenth* of September, the defendants applied to the plaintiffs to know whether they wished the draft sent back to be protested for *non-payment*, and were told that they had received it for collection, and if by any want of attention, any accident should occur to the draft, they would be held responsible. On the 9th *October*, 1833, the drawer died *insolvent*. When the draft was drawn, he had funds in the hands of the drawees, the amount of which, however, was not shown ; but when it was *presented* for acceptance he had no funds in their hands. The drawees testified that the lateness of the day of the presentment of the draft for acceptance, made no difference in regard to its acceptance, as it was an invariable rule with them not to accept for the drawer without previous advice. It appeared that *subsequent* to the *sixteenth* day of August, 1833, drafts drawn by John Eastabrook on the same drawees, amounting together to the sum of \$2000, were *accepted* by them, and paid or secured to be paid. It also appeared that the drawer of the bill conducted business as a merchant, in the city of New-York, down to the time of his death ; whilst on the other hand, it was shown that on 24th *July*, 1833, his note due to the plaintiffs for \$606.77, was protested at Concord, and remained unprovided for until the draft in question was given for its amount. The presiding judge charged the jury, that the defendants were bound to transmit the draft with all reasonable diligence after its receipt for acceptance, and not having done so, were guilty of negligence, and liable to the plaintiffs for the amount of damages they had sustained. That the court and jury having no knowledge of what the amount of the damage was, except from the proof of the amount of the draft, the jury would find a verdict for the plaintiffs for the amount of the draft and the interest thereon. The jury found accordingly. The defendants, having excepted to the charge of the judge, sued out a writ of error, removing the record from the *superior court of law of the city of New-York* to the supreme court, where the

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judgment was *affirmed*. See the opinion delivered in the supreme court, 17 *Wendell*, 370. The defendants sued out a writ of error, removing the record into this court. The cause was argued here by

— *Gray & S. A. Foot*, for the plaintiffs in error.

*D. Lord, Jun.* for the defendants in error.

After advisement the following opinions were delivered :

By the CHANCELLOR. Two questions of importance to the commercial community are presented for our consideration and decision in this cause : 1st. Whether an agent or broker who receives for collection a draft or bill of exchange payable at a particular day, or a certain number of days after its date, is under any obligation to present the same to the drawee for acceptance immediately, and before the time when the draft is due and payable ? And 2d. If he is, whether the person who has given him such draft or bill for collection, can, in case of his neglect to present the same before the day of payment, recover the whole amount due thereon, with interest ; although the owner has not in fact sustained damage to that extent, by the neglect of his broker or agent to present the bill for acceptance without any unnecessary delay ?

A bill payable at *sight* or a certain number of days *after sight*, must be presented for acceptance and payment, or for acceptance only, without unreasonable delay, or the drawer and endorsers will be discharged, for they have an interest in having the bill accepted immediately, in order to shorten the time of payment, and thus to put a limit to the period of their liability ; and also, to enable them to protect themselves by other means, before it is too late, if the bill is not accepted and paid within the time originally contemplated by them. But in relation to a bill payable *at a day certain*, as at a fixed time after its date, it is perfectly well settled, not only in this country and in England, but also in Scotland and in France, that the drawer or endorser of

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the bill is not discharged by the neglect of the holder to present the same for acceptance immediately, or until the time when it becomes due and payable. If, however, such a bill is actually presented for acceptance, and is dishonored before it becomes due, notice of such dishonor must be given to the drawer or endorser without delay, or he will be discharged. 3 *Kent's Comm.* 2d ed. 82. *Townsley v. Sumrall*, 2 *Peters' U. S. R.* 170. *Goodall v. Dolley*, 1 *Tenn. R.* 712. *Bayley on Bills*, 212. *Glen*, 109. *Byles*, 102. *Evans*, 80. *Muir*, 22. 2 *Pardessus*, No. 358, p. 417, 2d *Paris ed.* All the writers agree, however, that the owner of the bill has an interest in having it presented for acceptance without delay, although such presentment is not necessary in the case of a bill payable on a day certain, to enable him to retain his claim against the drawer or endorser of such bill; and that if the agent who has been entrusted with the bill for the purpose of getting it accepted and paid, or accepted only, neglects to comply with the direction of the owner, to get the bill accepted without any unnecessary delay, he will be liable to the owner for the damage which the latter has sustained by such negligence. *Pardessus* says, that the right to require an acceptance in such a case is one which the holder of the bill may use or not, as he thinks proper, but that it is certainly an advantage to him to demand such acceptance; for if the drawer is in credit, the drawee will probably accept, and the holder will thus obtain an additional security for his debt; whereas, if he delays to present the bill for acceptance until it becomes due, and the drawer fails in the meantime, the drawee may then refuse to accept; and he might have added, for such is the rule of the French law on the subject, that if the bill was protested for non-acceptance before it became due, the holder would then have been entitled to demand, both of the drawer and of the endorsers, security for the payment of the bill when it should become due, or for reimbursement, with the expenses of protest and re-exchange. *Pardessus* also says, that the bearer of the bill may hold it as a mere agent, to do what is necessary for the interest of his principal; in which case, he ought to

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act according to the express or implied duties which are derived from his relation to such principal ; and among the duties which his situation imposes upon the agent, is that of presenting the bill for acceptance whenever the law or prudence imposes such an obligation upon him. 2 *Pard. No.* 358, p. 417, 420. *No.* 583, p. 669. It was upon this ground that the case of *The Bank of Scotland v. Hamilton*, referred to in a note to Bell's Commentaries and also in Chitty on Bills, was decided. And *Glen*, who also has a brief note of that case, states as exceptions to the rule—that it is not necessary to present a bill, payable at a time certain, for acceptance, before it becomes due—the case of a direction to the payee or holder of the bill to present it immediately, and the case of a bill sent to an agent for negotiation. *Glen on Bills*, 109.

The counsel for the plaintiffs in error, however, attempted to take the case out of this last exception to the general rule, on the ground that these agents only received the bill for collection, and that they received no instructions to present it for acceptance before it became due. I infer, however, from the note of the case of *The Bank of Scotland v. Hamilton*, as given by *Glen*, that the present case cannot be distinguished from that in this respect. For it there appears that the bill then in question was finally presented for acceptance on the evening of the fourth day from its date, after the drawer had failed, and then only in consequence of a letter from *Dunlop*, who had sent the bill to the agents in Glasgow three days before. From that statement of the case, I think we may fairly presume there were no special directions to the agents to present the bill for acceptance when it was originally sent to them for collection, especially as it had but four days to run when it was originally discounted by *Dunlop*. On this subject, *Pothier* says, in regard to the endorsement of a bill by the owner thereof to another, as a *mere agent* to receive the amount due thereon for the endorser and as his proxy, "the contract which such an endorsement implies, and which it makes between the endorser and the person to whom he makes his order, is a contract of agency, and creates the ordinary obli-



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gations of an agent ; and consequently, he to whom the order is given is liable in the character of an agent, as regards his endorser, the owner of the bill, to obtain acceptance if it has not already been accepted, and to go when the bill becomes due to receive payment thereof, and remit him the amount ; and also, in default of acceptance or of payment, to make the protests, &c. which are necessary in such cases, and the endorser on his part is bound to make good the whole of the expenses which have been incurred therefor by the endorsee." *Poth. Traite Du Cont. De Change*, ch. 4, No. 82. Again : "The bearer of the bill, where he is merely the agent of the owner, ought to present it as soon as possible to the drawee to have it accepted. It is very important to have it accepted, as it is only by accepting it that the drawee becomes bound to pay it. Without such acceptance, the owner of the bill has for his debtor only the drawer of the bill, to whom he has paid its value. Therefore if the drawer should happen to fail, the bearer of the bill who had neglected to present it for acceptance would be liable to damages, if it was his fault, in favor of the owner of the bill for whom he was agent." *Id.* No. 128. The principles thus laid down by *Pothier* are recognized by *Beaves* and *Paley* as sound and correct, in relation to the duties and liabilities of agents who are employed in negotiating or collecting bills of exchange ; and I can see no good reason why they should not be applied to the case now under consideration. If the receiving a bill by an agent, to collect, implies an obligation on his part to take the necessary steps to charge the drawer and endorsers, by protest and notices, in case it is not accepted and paid by the drawee, I do not see why due diligence on the part of the agent, in procuring the acceptance of the drawee without delay, when it may be necessary or beneficial to the interests of the principal, should not also be implied, as it is the duty of a faithful agent to do for his principal, whatever the principal himself would probably have done if he was a discreet and prudent man. Even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent. The fact,

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therefore, that the bill in this case was not put into the hands of the agents for collection until some time after it bore date, was no legal excuse for their negligence in not sending it on for acceptance and payment without unnecessary delay. For these reasons, I agree with the court below, that the Allens were legally liable to the owners of this bill for the damages, if any, which the latter sustained by the non-presentment of the bill to the drawee for acceptance previous to the time it became due.

In relation to the amount of damages, however, I think the charge of the judge who tried the cause was clearly wrong; and that it has unquestionably produced great injustice in this case. As we have before seen, the relation between the drawer or endorser of the bill and the person to whom it is transferred for the mere purpose of negotiation or collection, is not the relation of endorser and endorsee, so as to throw the loss of the whole amount of the bill upon the latter, if he neglects to present the same for acceptance and payment in time, or to give notice of its dishonor to the endorser, as required by law. Nor will the payment of the damages by the agent, have the effect to subrogate him to all the rights and remedies of the person from whom he received the bill, as against other parties who may be liable for the payment thereof; but it is a mere contract of agency, which leaves the endorser to all his rights and remedies for the recovery of his debt as against other parties, and only renders the endorsee liable as agent for the actual or probable damages which his principal has sustained in consequence of the negligence of such agent. This principle was distinctly recognized by the court of king's bench in England, in the case of *Van Wart v. Woolly, 5 Dowl. & Ryl. 374*, where the plaintiff had not lost his remedy against the drawers of the bill, or the persons from whom he received it, by reason of the neglect of the agents to present it for acceptance in due time; the drawers of the bill in that case having drawn without authority when they had no funds in the hands of the drawees, and Irving & Co., who had sent the bill to the plaintiffs in payment, not standing in the situation of endorsers of the bill, as their names did not appear upon it. In that case, however, if



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there had been any evidence to warrant the belief, that the bill would have been accepted if an immediate acceptance or rejection of the bill by the drawees had been insisted on, according to the decision in the case of *The Bank of Scotland v. Hamilton*, the loss which had arisen from the neglect of the defendant in not pressing for an acceptance, or in not giving due notice of the dishonor of the bill immediately, if it could then probably have been collected from the drawees, should have fallen upon *Wooley & Co.* instead of *Irving & Co.*, who had remitted the same to Van Wart; and the plaintiff would then have been permitted to recover whatever damages had been sustained by such negligence, for the benefit of *Irving & Co.* In the respect, *Irving & Co.* stood in the same relative situation to Van Wart, as Dunlop did to the Bank of Scotland, in the case before referred to; and *Woolley & Co.* occupied the situation of *Hamilton & Co.*, who were held liable in that case, in exoneration of Dunlop's liability. The only difference in principle which I can see between the two cases is, that in the Scotch case it was evident that the bill would probably have been accepted [and saved, if it had been presented for acceptance on *Saturday*, when it was received by the agent in Glasgow, instead of being kept back until *Tuesday* evening, when news of the drawers' failure had reached that place; and therefore, to exonerate Dunlop, who remitted the bill, the agents in Glasgow were very properly charged with the amount of the bill, the whole of which had been lost through their negligence, except the small amount of dividend which the bank would be entitled to out of the drawers' estate under the commission of bankruptcy against him; whereas in the case of *Van Wart v. Woolley*, there was no reason to believe that the bill would have been accepted if the agent had insisted upon an answer immediately, and there was as little probability that any thing would have been obtained from the drawers, if Van Wart or *Irving & Co.* had received notice of the dishonor of the bill immediately after it was received by the agent in London. In the latter case, therefore, the damage which either Van Wart or those who had transmitted him the bill in payment had sustained, was merely nominal. Besides,

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the supreme court of this state having decided, that neither the drawers nor Irving & Co. were discharged from their liability to the plaintiff by this neglect of his agent, neither of them in fact having been injured by such neglect, the plaintiff upon the second trial was, of course, only held to be entitled to such damages as he had sustained, and which were nominal only. If the rule laid down by the judge who tried the present case was correct, that the principal was entitled to recover the whole amount of the bill and interest, because there was no other evidence to enable the jury to discover what the damage was, then the plaintiff in the case of *Van Wart v. Woolley*, should have been permitted to retain his verdict upon the first trial; as it did not then appear whether he could actually succeed in collecting the money, either from the drawers of the bill or from Irving & Co.; neither did it then appear whether by the laws of this state, where they resided, they were not actually discharged from liability, so that no judgment could be recovered against them, in consequence of the negligence of the agent. The granting of the new trial in that case, therefore, proceeded upon the principle that the agent was not liable for the whole amount of the bill, unless damages to that extent had been sustained by his neglect, and that to recover damages to that extent it was incumbent upon the party claiming, to give sufficient evidence to satisfy the court and jury that it was at least probable that he had sustained damages to that amount. Neither the Scotch or the English case, therefore, is an authority to sustain the charge of the judge in relation to the amount of damages in the present case; on the contrary, the case of *Van Wart v. Woolley* is a direct authority to show that the agent ought not to be charged with the whole amount of the bill, unless there is sufficient evidence to render it at least probable that the whole amount of the debt would have been saved if the agent had discharged the duty which his situation imposed upon him.

Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty; or

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where, by the negligence of the agent, the liability of a drawer or endorser who was apparently able to pay the bill has been discharged, so that the owner of the bill cannot legally recover against such drawer or endorser, I admit the agent by whose negligence the loss has occurred is *prima facie* liable for the whole amount thereof with interest, as damages; unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner in consequence of such negligence. The case under consideration, however, is one of a very different description. Here it is perfectly evident, from the testimony of one of the drawees, that the draft would not have been accepted at any time after it was received by the Allens for collection, as the drawees had received express directions from the drawer not to accept; nor would they have accepted it, even without such a prohibition, unless they had previously been advised so to do by the drawer. The fact also, that the drawer's credit was not good at the time this draft was received for collection, he having suffered his note to Boyd & Suydam to lie under protest for some time, and the express directions given by him to the drawees not to accept this draft, rendered it highly improbable that he would have paid the draft himself to save his credit, if it had been sent back protested at an earlier day. From the facts of the case, therefore, I think there was no ground for supposing that the owners had sustained any actual damage from the mistake of the Allens, in not sending on the bill for acceptance immediately after they received it for collection in New-York; or that their chance of obtaining payment from the drawer was materially impaired by the delay of the protest for a few days. Under the circumstances of this case, therefore, I think the jury should have been instructed that, upon the evidence, the plaintiffs were only entitled to nominal damages; or at least they should have been told to find only such damages as they should, from the evidence, believe it probable the plaintiffs might have sustained by the delay in presenting the draft for acceptance immediately; for I do not see how it is possible for any one to believe, or even to suppose it probable

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from this evidence, that the whole amount of this draft was in fact lost to the plaintiffs below, by the delay of the Allens in presenting it to the drawees, and giving notice of the dishonor thereof immediately to the drawer ; who never intended that it should be accepted and paid.

For these reasons I am of opinion that the judgment of the court below should be reversed, and that a *venire de novo* should be awarded ; to the end that no more damages may be recovered than such as a jury may believe it probable, from the evidence adduced, that the plaintiffs may have sustained from the negligence of their agents.

By Senator VERPLANCK. In this case the defendants in the court below were agents for collecting for a commission, a draft on another state, payable *after date*. What are the duties and responsibilities of agents in regard to presenting such paper for acceptance ? Legal authority as well as commercial usage, has long settled as a general rule, that the holder of a bill of exchange, payable at a specific time, is not obliged to present such bill for acceptance in order to hold the drawer or prior endorsers. It is, indeed, usual as well as prudent, to do so, both for the sake of the added security and better credit of the paper, and because in case of refusal, recourse may be had immediately to the drawer. It is, therefore, the duty of an agent for collection, to exert the customary prudence, and present such paper for acceptance without delay, since, by neglect, his principal may either lose the drawee's security, and the credit it gives, or else be prevented from making such inquiries and demands, or using such legal or precautionary measures towards the drawer or other parties as might tend to secure his debt. This distinction was long ago stated by Pothier, who points out the different obligations of him who holds a bill as an agent, ("*mandataire*," ) " who ought to present it for acceptance as soon as possible ;" and those of him who holds as owner, ("*lorsque le porteur est en meme temps le proprietaire*," ) who may present it when he thinks fit. *Contrat du Change, partie 1, c. 5, art. 128*. This distinction was recog-

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nized in the English elementary books, (see earlier editions of *Chitty on Bills*, and other writers there cited,) as part of the general commercial law of Europe, before any express judicial decision to that point. The modern case of *Van Wart v. Woolley*, 5 Dowl. & Ryl. 374, 3 Barn. & Cress. 439, has sanctioned the principle judicially, by deciding that the delay of an agent to give notice of non-acceptance of bills, subjected him to damages, even when the drawer was not discharged. The case of the *Bank of Scotland v. Hamilton*, cited in 1 *Bell's Commentary on the Laws of Scotland*, 409, decided by the Scotch court of sessions, is remarkable for its similarity to the present case, and is entitled to the same authority with us, as it receives in England, (see *Chitty on Bills*, 300, who refers to that case as an authority to this point,) as well on account of the general uniformity of the law of negotiable paper in the civilized world, as because it is evident from the books that on this head the Scotch law conforms to the English, and is much governed by its usages and decisions. In that case, a bill payable at Glasgow, three days after date, was sent to an agent at that city for collection. It is stated "that it is not customary for *porteurs* (bearers) of bills at short dates to present them for acceptance." Before the day of payment the drawer failed, and the Glasgow Bank refused to accept. It was not clear whether the bank would have accepted the draft if it had been immediately presented, for the bank had no funds of the drawer, and the practice had been to make provisions for such drafts at the day of payment. The action was against the agents. "The court held, that as *agents*, they were bound immediately to present the bill for acceptance."

Thus, it seems to be the general commercial law of the civilized world, that when a bill is payable at a day certain, the drawer and endorser are not discharged, if the bill is not presented until the day of payment. Yet it is still the duty of the *agent* for collection to present the bill for acceptance without delay, and to give immediate notice of refusal to accept. The reason of this, I take to be, that the drawer by fixing a day certain for payment, assumes the responsibility of providing funds at

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that time, whatever may have been his previous credit with the drawee. Again : an endorser makes, as the phrase is, "a new bill on the same terms ; and, besides, he waives his right of immediate acceptance, by not enforcing it, but putting his bill into circulation without acceptance." Not so, he who places a bill in his agent's hands for collection. He makes no waiver or postponement of any of his rights, but looks directly to the means necessary or expedient for his own security. In the present instance, the draft, which the payees might have retained until the day of payment, had they thought fit, was placed directly upon receiving it, in the hands of agents, who were to receive "a commission or compensation for collecting the same." It was retained for seventeen days by the agents, who could have forwarded it for acceptance the next day. Nor after it had been refused acceptance did they again present it for payment. In the delay of presentation for acceptance, there was want of due diligence. The principle is familiar, that an agent for pay is bound to use such means, care, skill and precaution, as are adequate to the due execution of his trust. He must use the ordinary diligence of a skilful and prudent man in such affairs. Now an early presentment for acceptance, is an obvious precaution which a prudent man of business would take, to ensure collection of a questionable draft. By this neglect or delay, the payees were prevented from making those demands and taking such immediate measures as to the drawer, on receipt of notice of non-acceptance, as might possibly have secured the payees in some way or other. At the late period at which they did receive such notice, they preferred looking to the responsibility of their agents. These must be held responsible for the consequences of their negligence to the amount of the damage so caused. Nor is it a sufficient defence of the agents, that the bill would not have been accepted if immediately presented, because the drawer had directed that it should not be, nor that it was uncertain whether the funds in the hands of the drawees were sufficient or not, to meet the draft at the day fixed for payment. At and after the time when the draft should have been



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presented, the drawer was in business at New-York, struggling for and obtaining credit, and having the command of funds which he applied to pay other drafts presented subsequently to the date, when with due diligence, notice of the non-acceptance of this bill would have been received. Whatever might have been his first intention, it was not for a court and jury to assume the broad presumption that an immediate demand, upon return of the draft, with such other legal measures as the state of business between the parties or other circumstances might render advisable, would not have led to the ultimate payment. As a mere conjectural inference from the character and course of business of Eastabrook, as incidentally presented in the evidence, I should think the probability rather the other way; and that immediate and urgent measures might perhaps have prevented loss. His death and the consequent insolvency of his estate, have left all this mere matter of conjecture; but it is quite immaterial as to the question of the agent's duty and the right of action against him, though were it distinctly in evidence either way, it might affect the measure of damages.

Thus far, then, I think the law quite clear as to the rights of holders of bills, and the duties of collecting agents, but I have had more hesitation as to the rule of damages. Is the plaintiff in similar cases to be obliged to make out in evidence the precise actual amount of the damage he sustained, and thus to give to the party in fault all the numerous and great advantages of doubt, uncertainty and difficulty in the proof? Or are we to apply to these cases the doctrine of *laches* in commercial paper, as between the holder and other parties, and consider the agent as having made the paper his own by his neglect? Contradictory as these rules are, they have yet each their share of authority, and are just and wise when applied to other questions; but I am not satisfied with the equity in the commercial policy of either, when applied to a collecting agency, and I have sought in the decisions for some safer and more equitable doctrine on that head.

Considering the subject in regard to commercial policy, there

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is, on one side, the vast amount of paper daily collected through our banks, the great public necessity for giving every facility and inducement to such collections, the serious drawback on those facilities and inducements that would be occasioned, and the opportunity of fraud afforded if worthless paper deposited for collection can, whenever parties are discharged by the blunder of a clerk, be saddled irrevocably on responsible agents and "made their own" absolutely and without allowing any defence or mitigation of damages. On the other hand, the policy of holding such agents to strict accountability is equally clear. Our whole system of negotiable paper and its responsibilities, formed, as it is, by long experience, and admirably adjusted to the varied uses of commerce, rests upon the single principle of strict punctuality in demands, presentments and notices, as well as in payments. Now the policy and necessity of that punctuality, apply with the same force to the agent of such paper that they do to the principal. I can, therefore, find no sounder rule of damages, nor one better protecting and reconciling all these claims of policy and justice, than that pointed out by the decisions in a large class of cases of agency, and by the analogy of the measure of damages in trover. In those cases, the presumption is, in the first instance, to the full nominal amount of the loss, as it appears on the face of the transaction against the agent wanting in diligence, or the party guilty of the tortious conversion. Thus, where an agent or factor neglects to insure for his principal, according to order, he is held responsible for the default, *prima facie*, to the total amount which he ought to have covered by insurance. But at the same time he is allowed to put himself in the place of the underwriter, and to prove fraud, deviation, or any other defence which would have been good, had the insurance been made, or which would go to shew that nothing at all, or how much was actually lost by the neglect. *Delancy v. Stoddart*, 1 T. R. 22. *Wallace v. Telfair*, 2 id. 188. *Webster v. De Tastet*, 7 id. 757. In the courts of this state, *Randle v. Moore*, 3 Johns. Cas. 36. And in the courts of the United States, *Morris v. Summeril*, 2 Wash. R. 203. See also 1 Phil. on Ins. 521,



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and the cases there cited. So, too, in actions against sheriffs, where those official public agents become chargeable with the debt of another, by their own negligence or misconduct. When the default is established, the amount due the plaintiff in the original suit, is the *prima facie* evidence of the measure of damages. This presumption may be controlled or rebutted, and the sheriff may give in evidence any fact, showing either that the party has not been actually injured, or to a much less amount. He may show, for instance, the insolvency of the original debtor. But the burden of proof is upon him; if he leaves the presumption uncontradicted, that establishes the measure of damages. This has been frequently ruled at our circuits, nor can I find that it has ever been questioned in our supreme court, and is substantially recognized in *Potter v. Lansing*, 1 Johns. R. 215, *Russell v. Turner*, 7 id. 189. The Massachusetts decisions are particularly full and express on this very point. See 10 Mass. R. 470; 11 id. 89; *ibid.* 188; 13 id. 187. Similar decisions may be found in the reports of other states. So again in trover. In *Ingals v. Lord*, 1 Cowen, 240, in trover for a note, it was held, that the *prima facie* measure of damages was the face of the note; but that evidence might be given to reduce the amount, by proving payment in part, or the insolvency of the maker, or any other fact invalidating the note or lessening its value.

It is true, that Lord Tenterden, in *Van Wart v. Woolley*, above cited, held that damages must be shewn, and that the face of the bill is not the *conclusive* measure; but this I think is not in contradiction to the view that I have taken. I therefore take the cases before mentioned to point out the sound doctrine here. The face of the bill is the *prima facie* measure of damages. These may be reduced by any positive evidence proving the real damage to be less; but the burden of that proof must be upon the negligent agent, and not on the party who suffers by his negligence. Circumstances like those of the present case, may often render it difficult or impossible for either party, to prove or even to form a probable estimate of the precise damages incurred by the agent's neglect. In such cases, is it not just that those

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chances of loss which must fall upon one or the other, should be thrown upon the party in default, and not upon the innocent sufferer? It was, then, for the defendants here to show that the debt would not have been paid had due diligence been used, or that there were any other circumstances to diminish the actual damages below the nominal amount. I do not see that this was done, and therefore think that Chief Justice Jones was right in his charge, "That the court and jury having no knowledge what the amount of damages was except from the proof of the amount of the draft, the jury should find for the plaintiffs for the amount of the draft, and interest from the day it became due."

Perhaps the case was a hard one. So are many others that arise under our law of negotiable paper, in consequence of *laches* of parties. In all such instances, the hardship of the particular case must yield to the necessity of adhering to some general rule founded on broad considerations of public policy. I can find no such rule safer or more conducive to commercial convenience, or sanctioned by stronger authority than the one I have stated.

If, however, we abandon this rule, the only alternative, in my judgment, so far as authority governs, is to adopt the stricter doctrine of our supreme court, in *Le Guen v. Gouverneur & Kemble*, 1 Johns. Cas. 467, and affirmed in 1800, in this court, "That where the property consists of *credits*, the agent whose breach of orders causes damages, is bound to answer to the amount of the credits, and the principal may abandon to him." The only defence distinctly recognized as valid in those doctrines, is that of fraud, or some similar one going to invalidate the whole contract.

Upon this principle, the agents here would be held to have made the paper their own by their default, if the plaintiffs below thought fit to abandon it to them; and this, perhaps, is the ground on which the superior court rested their decision in this case; the reasons of which I regret that we have not before us.

Under the circumstances of the case, either this rule or that which I have stated before, would affirm the judgments of the courts below; but I place my own vote for affirmance upon the

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ground first stated, as being the most equitable, the most conducive to public policy, and as supported by the analogy and authority of many modern decisions.

On the question being put, *Shall this judgment be reversed?* the members of the court divided as follows: 20 in the *affirmative*, and 4 in the *negative*. Whereupon the judgments in the courts below were *reversed*, and a *venire de novo* directed to be awarded by the superior court.

In the rule for judgment of reversal, the following entry was made: "It is further ordered and adjudged, that an *agent* who "receives a bill of exchange for *collection* which has not been "accepted, is bound to present the same for acceptance without "unreasonable delay, as well as to present the same for payment "when it becomes due, or he will be liable to his *principal* for "the damages, which the latter sustains by such negligence."

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 PRIEST and others vs. CUMMINGS.
 

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The *widow* of a natural born citizen who was an *alien* when the act passed in 1802, *enabling aliens to purchase and hold real estate*, is not entitled to dower under the provisions of that act, where the lands in which dower is claimed were acquired by the husband, and the marriage took place *previous to the passage of the act*.

A *feme covert* who is an *alien* may be naturalized; but her naturalization has not, under the general acts of congress, a retroactive operation, so as to entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization.

A *feme covert* is not barred of her right of dower by joining with her husband in the conveyance of lands, and *acknowledging* her execution of the deed before an officer authorized to take the acknowledgment of deeds, if at the time of such acknowledgment, she be a *minor* within the age of twenty-one.

It seems, that such *feme covert* need not do any act *disaffirming* such conveyance before suit brought for the recovery of dower.\*

ERROR from the supreme court. Catherine Cummings brought her action in the superior court of law of the city of New-York

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\* The Chancellor, in commenting upon the case of *Sutliff v. Forgy*, 1 Cowen, 59, and 5 id. 715, S. C. in error, where the *alien widow* of a naturalized citizen was

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against Luke Kip, to recover, as the widow of James Cummings, her dower in certain lots in the city of New-York. In 1796, the lots in question were conveyed to her husband; on the 29th of January, 1802, the plaintiff was married to James Cummings, a natural born citizen, with whom she lived in the city of New-York until his death, in 1832; at the commencement of this suit, the defendant was in possession of the premises in question under title derived from the husband of the plaintiff, by virtue of the foreclosure of a mortgage executed by him to one *James Foster*, bearing date the 4th June, 1802. The mortgage was foreclosed in chancery, the decree ordering a sale of the mortgaged premises was made on the 10th April, 1804, the premises

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permitted to recover dower in lands purchased by the husband, and conveyed to him during the coverture, expressed the opinion that the decision in that case was made upon the ground that the widow was at the time of the purchase by the husband capable under the enabling act of 1802, of purchasing and holding real estate, and that by the same conveyance under which her husband took, and at the same moment when he became seised, she became a purchaser within the meaning of the act, of an inchoate right of dower; and that had the lands in the principal case been acquired subsequent to the act of 1802, whilst the plaintiff was an alien, and had she possessed at the time a legal capacity under the enabling act to purchase and hold real estate, that she would by the purchase of her husband have acquired an inchoate right of dower, which on the decease of her husband would have become absolute.

*Senator VERPLANCK* concurs with the chancellor in his view of the case of *Sutcliffe v. Forgey*; and upon the principal question holds that a woman, an alien at the time of her marriage, is not entitled, under the act enabling aliens to purchase and hold real estate, to claim dower in lands whereof her husband, a natural born citizen, was seised before her marriage, because: 1. title by dower is by act or operation of law and not by purchase; and 2. because the word purchase, as found in the enabling statutes, is not used in its technical sense as indicating one of the two modes in which only it is said that title to real property can be acquired, i. e. by descent or purchase, but that it is used in its ordinary and generally received sense, signifying the buying of land.

In respect to the effect of the naturalization of the plaintiff, *Senator VERPLANCK* concurs with the chancellor in the conclusion at which he arrived, as stated above—he holds that from the phraseology of the naturalization laws themselves, as well as from other considerations, the effect of a naturalization here is the same as that of a denization in England, i. e. that it is not retroactive but prospective; that the feme becomes entitled to dower out of all the lands whereof her husband was seised at the time of her naturalization, but not out of lands whereof her husband had been previously seised and which before her naturalization he had aliened.

*Senator WAGER* delivered an opinion for an affirmance of the judgment in the courts below upon the principle of *stare decisis*; he considering the decision in the case of *Sutcliffe v. Forgey* as controlling this case.

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were sold at public auction, and bid in by William H. Robinson, to whom the same were conveyed by a master's deed on the 1st June, 1804. The plaintiff was not a *party* to the suit in chancery. On the part of the defendant, it was shown that the plaintiff joined with her husband in executing the mortgage to Foster, and, on the day of its date, *acknowledged* her execution thereof before a master in chancery, who endorsed upon the mortgage a certificate of such acknowledgment; and also that she was *born* a subject of the king of Great Britain. To rebut this proof, it was shown that, at the date of the mortgage to Foster, the plaintiff was a *minor* within the age of twenty-one years, to wit, of the age of about nineteen years and six months, and a certificate of a court of record was produced that, on the 16th October, 1829, the plaintiff became a citizen of the United States in conformity to the acts of congress, prescribing the mode of *naturalization of aliens*. The defendant attempted to invalidate the proceedings in respect to the naturalization of the plaintiff, on the ground of irregularity; but as the objection is not noticed in the opinions delivered in this court, it is not here stated. The jury, under the charge of the court, found a verdict for the plaintiff, upon which judgment was rendered. The defendant having excepted to various decisions, sued out a writ of error removing the record into the supreme court. Kip, the plaintiff in error, having died, an order was made directing the cause to proceed at the suit of his heirs at law, the present plaintiffs in error. The supreme court *affirmed* the judgment of the court below. See opinion delivered by *Chief Justice NELSON*, 16 *Wendell*, 619, *et seq.* The defendants then removed the record into this court, where the cause was argued by

*D. Selden & B. H. Butler*, for the plaintiffs in error.

*S. Sherwood*, for the defendant in error.

*Points for the plaintiffs in error :*

I. The widow is not entitled to dower by virtue of the enabling statutes in respect to aliens; because,

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1. Her husband was a natural born citizen of the United States, and purchased the lands in question in 1796, long before the first statute in the series was passed. The purchase therefore was not made by him by virtue of the enabling statutes, nor is the wife, within their equity or spirit, entitled to the benefit thereof, especially as she was married before the enactment of either of those statutes. *Mick v. Mick*, 10 *Wendell*, 379. 12 *id.* 66. 4 *Kent's Comm.* 36, 37. 1 *R. S.* 740, § 2. 3 *id.* *App.* 596, § 2, 2d ed. *Jackson, ex dem. People, v. Etz*, 5 *Cowen*, 314. *Goodell v. Jackson*, 20 *Johns. R.* 703. 5 *Johns. Ch. R.* 239. *Jackson, ex dem. Woodruff v. Gilchrist*, 15 *Johns. R.* 116. *Buchanan v. Deshon*, 1 *Har. & Gill*, 280. 3 *R. S.* 343, 344. *McCartee v. Orphan Asylum Society*, 9 *Cowen*, 506. *Varick v. Jackson*, 2 *Wendell*, 166, 204. *Berry v. Mutual Ins. Co.* 2 *Johns. Ch. R.* 611, 612. *Jones v. Morey*, 2 *Cowen*, 314, 315. *Searing v. Brinkerhoff*, 5 *Johns. Ch. R.* 329, 331. *Van Rensselaer v. Sheriff of Albany*, 1 *Cowen*, 501, and the cases below.

2. The defendant in error being an alien at the time of her marriage, she acquired on such marriage no inchoate right of dower, and the land in question was therefore held by her husband up to the 26th of March, 1802, free from any charge, or incumbrance by way of dower, cases quoted, 1 *Cowen*, 95. The enabling statute of March 26, 1802, and the subsequent acts should not be so construed as to subject lands so held, to dower, by a retrospective effect. Such was not the intention of the Legislature. *Sayre v. Wisner*, 8 *Wendell*, 661, 663. *United States v. Arredondo*, 6 *Peters' U. S. R.* 733. *City of New-Orleans v. Armas*, 9 *id.* 224, 236. *Jackson, ex dem. Gratz v. Catlin*, 2 *Johns. R.* 248, 263; 8 *id.* 520, 555, 556, *S. C. in error.* *Dash v. Van Kleeck*, 7 *id.* 495, 502, 503 to 509. *Jackson, ex dem. McCloughry v. Lyon*, 9 *Cowen*, 669. *Beadleston v. Sprague*, 6 *Johns. R.* 101. *Gardner v. Trustees of Newburgh*, 2 *Johns. Ch. R.* 162, 167, 168. *Jackson, ex dem. Scofield v. Collins*, 3 *Cowen*, 89, 95. *Jackson, ex dem. Cooper v. Cory*, 8 *Johns. R.* 385. *People v. Platt*, 17 *id.* 195, 215, 216. 10 *Wendell*, 447. 7 *id.* 334. *Co. Litt. n.* 187. 2 *Black Comm.*

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251. 3 *Johns. Cas.* 113. 12 *Petersd. Ab.* 512, 735. 1 *id.* 323, *tit. Aliens. Co. Litt.* 18, b. 10 *Johns. R.* 232, and the above authorities.

3. As all persons are chargeable with a knowledge of the law, the legal presumption is, that the marriage was contracted between the defendant in error and her late husband, with reference to her existing incapacity to acquire a right of dower in his lands; whatever therefore may have been the actual intention of the Legislature, it was not in their power to pass a law varying the effect, or impairing the obligation, in this respect, of the marriage contract. See the above authorities, and *Cons. U. S., art. 1, sect. 10, § 1.*

4. The mortgage sale was made in June, 1804. Mrs. Cummings then had no inchoate right of dower in the land, and subsequent statutes could not give her such a right in respect to lands previously sold to a *bona fide* purchaser. See the above authorities.

5. The several considerations above stated materially distinguish this case from the case of *Sutliff v. Forgey*; which, therefore, even if correctly interpreted by the court below, cannot control this case. It is insisted, however, that the grounds of decision in that case, when properly understood, are in unison with the points above taken. See case 1 *Cowen*, 89, and 5 *id.* 713.

II. The acknowledgment of the mortgage by the wife, on her separate examination, under the statute, bars her claim to dower, though she was then under age.

1. The statute does not require that a married woman, in order to convey her interest in lands, shall be of full age. It is sufficient that having attained the age requisite to contract marriage, and having been duly married, she consents on the private examination to the execution of the conveyance. *Coates v. Cheever*, 1 *Cowen*, 479. *Whitbeck v. Cook*, 15 *Johns. R.* 490. *Demarest v. Wynkoop*, 3 *Johns. Ch. R.* 142, 144, 146. *Duplex v. De Roven*, 2 *Vern.* 540. *Jackson, ex dem. Stevens v. Stevens*, 16 *Johns. R.* 110. 5 *Cruise*, 90. *Drury v. Drury*, quoted 8 *Wendell*, 30, 21, 267. *Teller v. McCartee*, 2 *Paige*, 520. 3 *R. S. App.* 22 to 30. 1 *R. L.* 369. Also, *Statute of Fines*, 3



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*R. S. App.* 3. 6 *Wendell*, 12. 7 *Mass. R.* 14, 77. 3 *Bac. Abr.* 596, *tit. Infancy and Age*. 3 *Com. Dig.* 618. 4 *id.* 306, *tit. Gavelkind*. 12 *Co.* 122. 10 *Id.* 42. *Ld. Raym.* 486. *Stra.* 735. *Plowd.* 369, 370. 5 *Cruise*, 215, 217. 6 *Jac. Law Dict.* 208. 5 *Bro. Par. Cas.* 57.

2. The above principle, if for any reason inapplicable to a conveyance of lands *belonging* to the infant wife, applies in reason, and by analogy, to the relinquishment of her right of dower in her husband's estate, which is but an incident to the marriage contract; when competent in law to contract marriage she must be regarded as equally competent to this collateral contract, provided the statute formalities be complied with. *See the above authorities.*

3. The statutory examination having been provided in lieu of the common law assurances by fine and common recovery, the infant wife will be barred unless, as in those cases, she disaffirms it during her infancy. *The same authorities as last above and next below.*

4. At all events, the conveyance being merely voidable, it was the duty of Mrs. Cummings, on her coming of age, to disaffirm it within a reasonable time. Her coverture, at that time and subsequently, is no excuse for her omission, and after the lapse of nearly thirty years, and an adverse possession of more than twenty-five, she cannot now be permitted to avoid her conveyance on the ground of infancy. *See 2 Kent's Comm. Lect.* 31, *and authorities there quoted. Demarest v. Wynkoop*, 3 *Johns. Ch. R.* 144. 17 *Wendell*, 119.

III. The naturalization of the defendant in error can have no retrospective effect to entitle her to dower as against previous *bona fide* purchasers. *Cases cited by Ch. J. Nelson, in his opinion in this case. Collingwood v. Pace*, 1 *Ventr.* 417. *Fish v. Klein*, 2 *Meriv.* 431. 2 *Wash. R.* 113. *Vaux v. Nesbit*, 1 *McCord's Ch. Cas.* 352, 372. 2 *Chit. Com. Law*, 325, 326, 337. 2 *Greenl. Laws*, 280. 3 *R. S. App.* 21. 1 *Kep.* 174. 2 *Johns. Cas.* 33. *Bac. Abr.*, *tit. Alien, C.* 2. *Black. Comm.* 250, &c.



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*Points for the defendant in error :*

I. The respondent is entitled to her dower, notwithstanding her having been an alien. *Const. U. S. § 8. Act of Cong. April 14, 1802. Ing. Abr. 434. 6 Cranch, 176. 7 id. 420. 1 Johns. Cas. 399. 2 Kent's Comm. 57. 7 Wendell, 334. 12 id. 343. 1 Black. Comm. 374. 1 Petersdorf, 323, tit. Alien. Godfrey v. Dixon, Cro. Jac. 539. 2 Viner's Abr. 270, tit. Alien. 2 Black. Comm. 249, 250. 1 Co. Litt. 129, a, tit. Villenage. Clan. Treat. on Rights of Woman, 202. Co. Litt. 33, b. 1 Cruise's Dig. tit. Dower IV., ch. 2, § 26, 32. 9 Viner's Abr. 212, tit. Dower.*

1. She was *duly naturalized* under the laws of the United States, on the 16th October, 1829, during the life of her husband, and such naturalization removes all disabilities, and her rights attach retrospectively from the period of her marriage.

2. The record of naturalization is sufficient, notwithstanding the omission in the record of the words, "and within the state of New-York," which were inserted in the original affidavit between the words "New-York" and "one."

3. And notwithstanding that one of the witnesses testifying upon the naturalization, is alleged to have been the husband of Mrs. Cummings. *Campbell v. Gordon and wife, 6 Cranch, 176. Starke v. Chesapeake Ins. Co. 7 id. 420. Spratt v. Small, 4 Peters, 393. Shenk v. Dupont, 3 id. 248. 1 Johns. Cas. 29. 3 id. 109.*

4. She is entitled to her dower under the enabling statutes of 1802 and 1808. *3 R. S. 342, 343. Sutliff v. Forgey, 1 Cowen, 90. 5 id. 113. Mick v. Mick, 10 Wendell, 379. Co. Litt. 12. James v. Morey, 2 Cowen, 290. 2 Black. Comm. 241. Whelan v. Whelan, 3 Cowen, 579. Sterry v. Arden, 3 Johns. Ch. R. 261, 262, 271. 12 Johns. R. 236.*

II. The respondent is entitled to her dower, notwithstanding the mortgage given by Mr. Cummings to James Foster, 4th June, 1802, in which Mrs. Cummings joined, for,

1. She was an infant under the age of twenty-one, when the

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same was executed. *Sanford v. McLean*, 3 *Paige*, 121. *Howles v. Greensby*, 1 *Vesey, sen.* 299. *Stamper v. Barker*, 5 *Mad.* 157; 3 *Bac. Abr.* 596, *tit. Inf. and Age.* 7 *Cowen*, 180.

2. Her acknowledgment apart from her husband, while an infant, did not give validity to her act. 4 *Johns. R.* 161. 12 *id.* 469. *Preston on Conv.* 252. 12 *Co.* 122. 5 *Cruise's Dig. tit. Fine, ch. 5, § 26, 27, 28.*

3. Her rights are not barred by the foreclosure ; for as against her the mortgage has not been foreclosed, she not being a party.

After advisement, the following opinions were delivered :

By the CHANCELLOR. I have no doubt upon the question, as to the regularity and validity of the naturalization of the defendant in error in 1829. The fact that she was then a feme covert was no objection, as neither married women or infants are excluded from the benefit of the acts of congress on this subject. The fact that the statute makes the naturalization of the father, in certain cases, enure to the benefit of his infant children, does not preclude infants themselves from applying whenever it may be necessary ; and as the general language of the naturalization acts include all free white persons, femes covert and infants if they have sufficient capacity to understand their rights and the nature and obligation of an oath, may be naturalized.

I cannot admit, however, that the effect of naturalization under the general acts of congress, which have not declared what shall be the effect of such naturalization, can retroact so as to divest rights which have been acquired by others previous to such naturalization. It is said by Coke, and other elementary writers, that if a man take an *alien* to wife, and afterwards aliens his land, and then the wife is made a *denizen*, and the husband afterwards dies, she shall not be endowed, because her capacity and possibility to be endowed came subsequent to the marriage by the act of denization ; but that it is otherwise where she is *naturalized* by act of parliament, *Co. Litt.* 33, b ; *Clancy*, 202 ;

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and it is supposed that the effect of a naturalization under an act of congress must necessarily have the same effect as naturalization by act of parliament. That a naturalization here has the effect to give to the naturalized citizen inheritable blood, so as to enable him to take by descent from another citizen, as well as to acquire lands by purchase, I have no doubt. It probably would also have the effect to give to the naturalized wife a capacity to take an inchoate right of dower in lands, of which the husband was seized in fee at the time of her naturalization, so as to give her the right of dower therein at his death. To that extent the husband takes his land, subject to the right of his wife to acquire a title to dower therein, by a subsequent naturalization under a law which was in existence at the time of his purchase, or marriage; and as the wife after her naturalization has an inchoate right of dower in such lands, of which she cannot be deprived except by her own consent, a subsequent purchaser from the husband who neglects to procure her release, takes the land subject to such right. But where the husband had parted with all his interest in the land before his wife had the capacity to take even an inchoate interest therein, which could by any possibility be released while the wife was an alien, it would be contrary to every principle of justice and common sense to give her the right to divest or impair the title of the purchaser, by her subsequent act of naturalization. The same objections would also exist to the retroactive operation of a naturalization, where the person thus naturalized had previously been passed over in the descent of real estate, in favor of a more remote lineal or collateral heir who was not an alien. In such cases, if the principle of retroaction contended for here, should be adopted and established, the estate would to a certain extent be rendered inalienable in the hands of the owner thereof. In the first case, the possible right of the alien wife could not be extinguished by any release or common law conveyance; and in the last case, no one could safely purchase from the more remote heir, upon whom the inheritance had descended, until all the intermediate alien heirs and their descendants, who were in existence at the time of the

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descent cast, were dead, as it could not until then be known to the purchaser whether any, and if any, which of them would become naturalized.

The effect of a statutory naturalization in England, in overreaching previous vested rights, depends upon the omnipotence which has been ascribed to an act of parliament; in which at some of the earlier periods of English history, a due regard was not always paid to the rights of third persons who had not petitioned for the passing of the act. These private acts of naturalization are seldom found in the printed collections of English statutes; but by a reference to one which is published by Mr. Chitty as the common form of such acts, 2 *Chit. Com. Law. App.* 325, it will be seen that the nature and extent of the rights acquired under it, are declared in the act itself, and that the language is very strong to show the intention of the law makers to give it a retrospective operation, not only as to inheritable blood, but also to place the person naturalized in the same situation, both actually and *constructively*, as if he had been a natural born citizen at the moment of his birth. To show that by the common law a mere parliamentary act of naturalization did not necessarily retrospect, without reference to the terms of the act, it is only necessary to refer to the opinion of Lord Hale, in the great case of *Collingwood v. Pace*, 1 *Vent. R.* 419. He says: "Touching the retrospect of a naturalization, and whether the eldest son, being an alien, naturalized after the death of the father, shall direct the descent to the youngest, depends upon the words of the naturalization, which being by act of parliament, may by a strange retrospect direct it. But as the naturalization in the case in question is penned, it would not do it; the naturalization hath only respect to what shall be *hereafter*." I conclude, therefore, that the naturalization of the defendant in error had the same effect as to the rights of property as letters of *denization* had by the common law, and the same effect as to all other rights that an act of parliament giving her all the rights of a natural born subject, and without any special provisions to give it a retrospective operation. She therefore had from that time the capacity to take an estate in dower, of and in any lands

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of which the husband was then seized of an inheritable estate ; to take lands by devise or descent from any person capable of conveying or transmitting lands in that manner to her ; and to take any other interest in real estate by gift or otherwise to herself, and to sell, alienate or bequeath the same, or transmit the same to such of her heirs as were capable of taking by descent, as fully as a natural born citizen might do, but not otherwise. Her naturalization, however, did not retrospect so as to deprive the mortgages of her husband, or those claiming under them, of any right or interest in his lands which they had acquired previous to her naturalization. I shall therefore proceed to consider the question whether she had acquired any inchoate right of dower, under the enabling statute of 1802, which could enable her to demand dower in the premises after the death of her husband, notwithstanding the mortgages and the foreclosure thereof in 1806.

I may as well observe here, that I have no doubt as to the invalidity of the objection of the plaintiffs in error, that the demandant had barred herself of any claim to dower by the execution and acknowledgment of the mortgage, in conjunction with her husband, while she was still a minor ; or at least, that she should have done some act to disaffirm the conveyance before she brought her suit. There is no pretence that the custom of gavelkind ever applied to any of the lands in this state. It is true, that that custom extended to most of the lands in the county of Kent, and to all which were originally of soccage tenures, except such as had subsequently been disgavelled by the statute, 31 *Hen.* 8, *ch.* 3, and other private statutes. But the custom did not apply to lands in that county originally held by military tenures, which tenures, by the statute 12 *Charles* 2, *ch.* 24, were converted into tenures by free and common soccage. The manor of East Greenwich, in the county of Kent, was either originally held by the tenure of knight service, or it must have been disgavelled previous to the grant of the province of New-York, to James, Duke of York, as no traces of the custom of gavelkind, except such as were common to other soccage tenures, existed in this colony previous to the revolution. Having once deliberately

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examined the question, and come to the conclusion that an *infant feme covert* cannot convey an interest in lands by mere acknowledgment of the deed before a judge or commissioner, it is only necessary for me to say that I have not heard any thing on the argument of this case to induce me to doubt as to the correctness of the decision of the supreme court upon that point, which is in accordance with the decision in the case above referred to of *Sanford v. McLean*, 3 *Paige's R.* 121.

It is evident from the language of Chief Justice Nelson, who delivered the opinion of the supreme court in this case, that the justices of that court doubted whether the case came within the provisions of the act of 1802, if that act was properly construed; and that they would probably have given a different judgment if they had not supposed it impossible to distinguish this case from that of *Sutliff v. Forgey* decided by their predecessors in that court, and subsequently affirmed upon a writ of error here. I think, however, there is a manifest difference between the two cases, arising from the fact that the land in the case under consideration was held by the husband at the time of the passage of the act, and also at the time of his marriage with the defendant in error, and that in the other it was acquired afterwards. And in coming to this conclusion, I take it for granted, that the decision in the case of *Sutliff v. Forgey* must have proceeded upon the ground that the wife was entitled to her dower in lands acquired by her husband after the act of 1802, in the character of purchaser. The word *purchase*, in common parlance, has a much more restricted meaning than in its legal or technical sense, according to the common law, when applied to the acquisition of an estate or interest in land. According to the doctrine of the feudists, interests in land were divided into but two kinds, *feuda antiqua* and *feuda nova*, which are defined to be those to which the possessor succeeds as heir to his ancestor, and those which he has acquired in some other way. 1 *Sanf. on Herit. Suc.* 30; *Beame's Glanv.* 143. In the first case, the possessor is seized of the land by descent, but in the latter by conquest, *perquisitio*, or purchase. Where an estate comes to a man from his ancestor without writing, that is a descent; but



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when a person takes any thing from an ancestor or others, by deed, will, or gift, and not as heir at law, that is a purchase. 2 *Lilly's Abr.* 497 ; *Toml. Law Dict. Art. Purchase*; *Bel's Law Dict. Art. Conquest*. The estate of the wife as tenant in dower, is but a continuance of the estate of the husband, so that if he acquires land by purchase, or other conveyance to himself, she, by virtue of the same purchase, if then of legal capacity to take an inchoate right of dower, takes it as purchaser by the same conveyance, in the same manner as if he had taken a conveyance to himself and limited a remainder in one-third of the premises to his wife for life, in case she survived him. Such was unquestionably the opinion of Senator Colden in this court, in the case of *Sutliff v. Forgey*. He says there is no other question in the case than whether when the husband took the conveyance in 1804, he being then a naturalized citizen, and his wife an alien, she did not acquire a right of dower by purchase, so that she may hold the same under the act of 1802, notwithstanding her alienism ; and he concludes that her inchoate right of dower vested at the moment of the husband's purchase, and that she took it as purchaser, and not by descent. The first section of the act declares that all purchasers of land made or to be made by any aliens who have come to this state and become inhabitants thereof, shall be deemed valid to vest the estate to them granted, &c. If the wife is, therefore, considered a purchaser of her inchoate right of dower by the act of purchase by the husband and at the same moment, the fact that he was naturalized before the purchase did not prevent the inchoate right of the wife from vesting in her, as purchaser of such inchoate right of dower, by the provisions of the act. But in the case under consideration, the wife of Cummings had not purchased an inchoate right of dower in the lands of her husband before the act, because at the time of her marriage and until the passing of the act, she had not the capacity to acquire any interest in lands by mere operation of law, as an incident to a purchase by the husband, and the lands in question were not purchased by him after her disability was removed, but on the contrary, were purchased long

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before the marriage. She was not, therefore, a purchaser of an inchoate right of dower in these lands, either before or after the act of 1802, within the letter or the spirit of that act; and the title of the husband having been absolutely vested in a *bona fide* purchaser by virtue of the master's sale, long before her naturalization, she cannot divest that title to the prejudice of him or of his grantees. For these reasons, I think the judgments of the courts below erroneous, and that they ought to be reversed.

By Senator VERPLANCK. This case has been learnedly argued upon various points. One of the most important questions which has been raised, is on the effect of an acknowledgment according to the forms of our statute by an infant wife, upon her right of dower. This, in our State, must be a question of too frequent occurrence to be left in doubt, and if not clearly settled by judicial decision, should be defined as to future cases by legislative enactment. As in my view of the present case, the settlement of that question is not necessary to the decision of this cause, I shall decline entering into its examination or expressing any opinion on the subject. I also throw out of consideration the objections made to the record of naturalization, both because they are quite immaterial as to the course of reasoning and the conclusion of this opinion, and because they seem to me not entitled to any weight. On this point I concur fully with the reasons assigned by Chief Justice Nelson, in the opinion delivered by him in the supreme court.

Disembarrassing the cause of all the other points which have been taken in the argument before this court and in the opinions of the courts below, it is quite clear to me that Mrs. Cummings is not entitled to her dower: unless, 1. As an *alien* she is entitled by her marriage to dower in the lands of her husband, who was a *citizen*; or 2. Unless her subsequent naturalization has a retroactive effect not only removing present disabilities, but enabling her rights to attach retrospectively, as against third parties and *bona fide* purchasers; or 3. Unless the statutes of 26th March, 1802, with the other statutes to the same effect of 1804,



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1805; 1807 and 1808, all passed subsequent to her marriage, enabling *resident aliens* to purchase and hold real estate, so operated upon her previously void interest in her husband's lands as to vest in her an inchoate right of dower, perfected at her husband's death, as a purchaser under these enabling statutes.

On the first branch of this inquiry, it is well settled here as in England, that, to use the language of Chief Baron Hale, "The law will not give the alien the benefit of either: 1. Descent; 2. Curtesy; 3. Dower." *Ventris*, 417. "Aliens are not capable of claiming dower." 1 *Cruise Dig.* 145, and the cases there cited. "A *feme covert* being an alien, was not by the common law entitled to be endowed, more than to inherit." 4 *Kent's Comm.* 36, and the cases there cited.

Does the naturalization of the widow in 1829 operate retrospectively, so as to attach the right of dower to lands held by her husband at the marriage and aliened *after* that period and *before* her naturalization? I concur with the supreme court, that on this branch of the case the widow cannot successfully claim her dower; but I have come to that conclusion by a course of reasoning very different from that of the chief justice. If this question rested wholly on English authorities, and if the effect of naturalization under our general laws was precisely the same with that under the special naturalization laws of parliament, the authority of Lord Coke, *Coke Litt.* 33, b., and the learned modern commentators and compilers, *Viner*, *Cruise* and *Park*, would be quite conclusive in favor of the retroactive effect of naturalization in regard to dower. *Cruise* thus sums up the English doctrine: "If an alien be naturalized by act of parliament, she then becomes entitled to dower out of all the lands whereof her husband was seized during coverture. In the case where a woman is created a *denizen*, she becomes entitled to dower out of all the lands whereof her husband was seized at the time when she was created a *denizen*, but not out of lands whereof he was seized before, and which he had aliened." 1 *Cruise Dig.* 146. I cannot agree with the chief justice that "the act of congress affords no great light to aid us in determining this point

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in the case." On the contrary, it strikes me forcibly that the language of our acts of congress on this subject point out a strong distinction between the legal operation of the rights of citizenship acquired under them, and that of the naturalization conferred by a British act of parliament. In the acts of parliament, the operative words are the same with those used in the books; I believe in all cases, certainly in all the cases where I have been able to ascertain the facts—either the more general acts in the statutes at large, or those cited in the reports. It is enacted that the party shall be "*naturalized*," or "shall be deemed, adjudged and taken to be a *natural born subject*," as if *born* within the kingdom. Thus in a statute, 33 *Henry*, 8, "The children of Thomas Powers and others, shall be reputed *natural born subjects*." In the statute, 7 *Anne*, c. 5, "All persons born out the ligeance of her majesty, who shall qualify themselves (&c. as therein provided) shall be deemed, adjudged and taken to be *natural born subjects* of Ireland, to all intents, constructions and purposes, as if they had been born within the said kingdom." So in the statute, 13 *George* 2, c. 5, naturalizing foreign protestants in America, it is enacted that they "shall be deemed, adjudged and taken, to be his majesty's *natural born subjects*, to all intents, purposes and constructions, as if they had been *born* within this kingdom." So again, by 2 *George* 3, 25, certain foreign officers and soldiers, who had served in America, are naturalized in the same words, "to be deemed and adjudged, as if they had been born within the realm." These seem to be the uniform operative words; and their legal effect, as stated by all the authorities is, "that an alien is put in exactly the same state as if he had been born in the king's dominions," 2 *Black. Comm.* 374; or, in the language of Lord Coke, "is to all intents and purposes a natural born subject." From the very words employed, then (unless there be some restrictive condition added) every such naturalization must relate back to the time of birth of the individual. The naturalized subject is, in the eye of the English law, one native born. The courts do not and cannot look behind the act of parliament to prior disabilities. By the omnipotence

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of parliament, the naturalized *alien* is to all intents a subject from his birth. This rule of interpretation, were such acts in England general, like ours, might frequently conflict with the vested rights of third persons. But as in England, every such act is either special for the individual, or limited to some small class of persons, it is to be presumed that such a result is generally avoided, either by previous evidence of the special circumstances of the case, or else by express words in the statutes saving any such rights in others.

The legal effect of *denization* in England, is not retroactive, as we have above seen. This is evidently not an arbitrary distinction, but grows out of the natural interpretation of the language used. There is nothing in the word *denizen* that has any relation to any specified time, especially to the time of birth. Denization is a new privilege conferred upon the alien, but not having, like the phrase *natural born* or *native*, any relation to the fact of birth or to its time, operates only from the date of its reception. Now the language of our acts of congress of general naturalization, differs from the special English acts in precisely the same manner, must be controlled by the same rules of legal interpretation, and of course are governed by the same distinction. They are called naturalization acts, but there are no words used putting the new citizen on the same footing as if he had been born in the United States. The operative words are, that on complying with certain conditions, the applicant "shall be admitted a citizen of the United States," or "admitted to citizenship," or "shall be admitted to become a citizen." The words "admitted," "become," and "shall be admitted to become," involve a future signification; nor is there any thing implied in the word *citizen*, more than in that of *denizen*, having relation back to the time of birth. I cannot, therefore, but consider all the English authorities denying *retrospective* operation to acts of parliament admitting to denization, as applying to and authorizing a similar interpretation of our acts of congress "admitting aliens, on complying with certain conditions, to become citizens." Even independently of any authority bearing on this subject, the obvious interpretation of language leads

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me to the same conclusion, that the legal rights of the alien born, admitted to American citizenship, like those of the British denizen, bears date only from his political and not from his natural birth.

This view of the effect of our naturalization statutes may be in contradiction to some of the transient *dicta* of our judges, but is in strict congruity with the decisions and well settled law in our courts. It agrees with those decisions, which pronounce the admission to citizenship here to remove all previous disabilities, in regard to the taking or holding real estate, and as merely perfecting the title therein, forfeitable to the state by reason of alienism, but not actually void until inquest of office found, and so, good against all other parties. On the other hand, it guards against any interference of the newly acquired rights of the "admitted alien with those of prior *bona fide* purchasers and other third parties, such as in the present case and numerous others which might accrue from marriage, descent, &c. in this country, where such multitudes annually acquire these new rights of citizenship under our general laws. This too is in conformity with the decisions of the courts. The cases establishing these latter points have been cited and stated by the chief justice in the opinion of the supreme court in this case, and I therefore refrain from further detail on this head. My conclusion, therefore, is, that Mrs. Cummings cannot maintain her claim to dower by virtue of her naturalization, in any lands aliened by her husband before such naturalization though during her marriage, and now held by others under a title deduced from him.

It remains then only to inquire whether Mrs. Cummings' marriage in January, 1802, did not vest in her an inchoate right of dower which was confirmed or perfected by the operation of the act of March, 1802, and the subsequent acts extending it, authorizing resident aliens to purchase and hold real estate? I am quite clear that she is not within the provisions of those acts, as to the lands now claimed. As the supreme court, as well as the learned court below in which this cause originated, have placed their decision in favor of the claim of dower mainly upon

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this ground, (governed by the presumed authority of a case formerly decided in the supreme court and affirmed in this court,) I shall enter somewhat more into detail than I have done on the other heads of the argument, in stating the reasons which have brought my mind to an opposite conclusion.

The statute of March 26, 1802, entitled "An act to enable aliens to purchase and hold real estate within this state, under certain restrictions," after reciting in its preamble that "whereas many good and industrious persons, being aliens, have emigrated to this state with an intention to settle and reside therein, and have expended the greater part of their capital in purchasing and improving real property," goes on to enact, "that all *purchases of land made* or to be made by any alien or aliens who have come to this state and become inhabitants thereof, shall be deemed valid to *vest the estates to them granted* ; and it shall and may be lawful to and for such alien or aliens to have and hold the same to his, her or their heirs and assigns forever, and to dispose of the same, any plea of alienism to the contrary notwithstanding ; *provided* that any purchase hereafter to be made by any such alien does not exceed one thousand acres." The statute of April 8, 1808, further enacts, that all persons authorized by that act or the one first cited, to acquire real estate by purchase, may also take and acquire by *devise* or *descent*. It was argued chiefly on the authority of a distinguished member of this court in former years, Senator *Colden*, in the case of *Forgey v. Sutliff*, 5 *Cowen*, 715, that the word *purchase* in this act does not mean merely the acquisition by bargain and sale, but should be taken in its peculiar technical common law signification, as defined by *Littleton* : "The possession of lands or tenements that a man hath by his deed or agreement, with which he cometh not by title of descent from any ancestor or cousin, but by his own deed." The general distinction of the later books is between the title acquired by act of law, as in *descent*, and that coming by the party's own act or agreement, which last is *purchase*. From these definitions it was inferred that a title by dower, coming by the act or agreement of the party, was within the technical meaning of the word purchase. But the true and precise

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meaning of any technical word is to be decided by usage and authority, not by argument or inference. Now the highest authorities and the most general usage will be found expressly to exclude *dower* from the head of *purchase*, and to place it under the opposite class of titles by *act of law*. I shall content myself with two authorities, which I select because they are among the earliest and the latest; the one from an illustrious old English judge, the other from an able American judge of our own days. It would be quite easy to fill up the chasm between them by a series of chronologically arranged authorities. Lord Chief Baron *Hale*, in his argument in the famous case of *Collingwood v. Pace*, speaking of the disabilities of aliens, says, "though the alien may take by *purchase* by his own covenant that which he cannot hold against the king, yet the law would not allow him to take by an *act of law*; for the law, *quæ nihil facit frustra*, will not give him an inheritance of freehold by *act of law*, for he cannot hold it, and therefore the law will not give him the benefit of either: 1. *Descent*; 2. *Curtesy*; 3. *Dower*; 4. *Guardianship*." *Ventris*, 417. To come at once to our own times and country, passing intermediate authorities, *Johnson*, J. in *Lord Fairfax's case*, decided in the supreme court of the United States, says: "When a freehold is cast upon an alien, by *act of law*, as by *descent*, *dower*, *curtesy*, no inquest of office is necessary." 7 *Cranch*, 629. I cannot therefore doubt but that title by *dower* does not come within the technical meaning of the word *purchase*; and as neither Mrs. Cummings herself, nor her husband during her marriage, *bought* these lands, she cannot be within the meaning of the act. But if, relying on the definition of *purchase* in the books, and some hasty *dicta* of American judges, any should still contend that *dower* is an estate by *purchase*, in the common law sense, this will still not help the claim. It seems to me evident that the manner in which the word *purchase* is used in the act of 1802, shews that it is not used in its peculiar real estate sense, but in its ordinary and habitual one. "All purchases of lands made" can mean only *all lands bought*. This use of the word is not colloquial or "vulgar," (as it has been called by *Jacobs* and other compilers,) but may be found in



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the written opinions of *Hardwicke* and *Kent*, and might well be used in legislative enactments. The phrase used is not the technical language of the old law. I cannot find that the words "purchases of lands made" are ever used to signify "lands acquired by purchase." *Cruise*, *Blackstone*, and the oldest writers whom they cite, always speak of "estates taken by purchase," "lands acquired by purchase," "estates unto which one comes by purchase." 1 *Black. Comm.* 218. 2 *id.* 243. 3 *Cruise*, 490. *Litt.* 1, 12. But on the contrary, "purchases of land made," is an ordinary phrase of lawyers and judges to signify "lands bought." The subsequent statute of 1808, in *pari materia*, has given a legislative construction to the act of 1802, by providing that "all persons authorized to acquire real estate under these acts, may also take by *devise*;" thus evidently showing that in the former act the broader sense of *purchase*, which would include *devise*, was not meant, but the more limited, natural and common one of *buying*. Besides this, the preamble of the act of 1802, above cited, speaks of the resident aliens, for whose relief it was passed, "having expended the greater part of their capital in *purchasing* and *improving* real property," and in the body of the act the estates so purchased, are spoken of as to *them granted*. This is the same principle of interpretation (though stronger in its application,) as that on which in *Twyne's* celebrated case, the statute of 27 *Eliz.* was held to apply only to *purchasers* for money or valuable consideration, in consequence of the word *paid* in one of the clauses, limiting the broader sense of the word *purchasers*. 3 *Rep.* 83. 4 *Cruise*, 382. I conclude, therefore, that Mrs. Cummings, an *alien* at the time of her marriage to a citizen, took no title to *dower* in lands previously owned by him; that her subsequent naturalization could have no effect in vesting in her any such title in lands previously aliened by her husband; and that the subsequent enabling acts of 1802 and 1808, did not give her any title, or enable her to claim *dower* in lands bought before marriage by her husband, when she herself at her marriage, was wholly unable to take any estate in lands by reason of alienism and the absence of any special statute to aid that disability.

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The supreme court, it is evident, was mainly governed in its decision by the case of *Sutliff v. Forgey*, in the supreme court, 1 Cowen 90, and affirmed in this court, 5 Cowen, 713. I have no desire to disturb the authority of that decision, which was settled in congruity with all the views I have taken of this case. That was the case of a resident alien widow whose husband (whether alien or naturalized seems wholly immaterial) actually *bought* lands *during marriage* and *after* the enactment of the enabling statutes. It was there held, that this purchase of lands enured to the benefit of the wife *who was at the time enabled to take a valid title in real estate*, that her dower "being an incident or legal consequence" of the acquisition of land by the husband, she was a buyer within the intent of the law—the husband's purchase being in fact *her's* to the extent of the right of dower. This certainly differs from the case before us in the most material points, and though the decision rests on a very liberal construction of the statutes, yet I doubt not that it is within their spirit and intent, and should unquestionably govern all similar cases. At the same time, it does not contradict or overthrow any of the principles or reasoning on which I found my opinion in the present case.

The chief justice has said that it is impossible to extract any different doctrine out of the case than the one which he states, i. e. "An alien widow of a naturalized husband is entitled to her dower out of lands of which he was seized, if she bring herself within the statutes of 1802 and 1808, enabling her to purchase and hold real estate at any time *during the seizin of the husband*; her right of dower, in such cases, attaches by reason of her capacity then to purchase and hold." This seems to me an extension of the doctrine far beyond what is warranted by the facts of the case, or any thing in the decision or reasoning of the judges. I find there no reference to the *seizin* of the husband as giving dower to the alien wife under the statutes. The *seizin* is indeed necessary to give effect to the dower; but it is the *buying* by the husband, the *deed*, the *conveyance* to him during coverture, which is held to operate as a buying and conveying *pro tanto* for the wife; and to be good under the statute,



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in the same manner, to use an illustration of Judge Woodworth, (though in an estate inferior, both in degree and amount,) as if the conveyance had been made to the husband and wife giving the peculiar estate which the law creates in such a case, and which an alien wife, enabled by the statute, could doubtless take: "It was a purchase," in the words of Judge Woodworth, "effected through the medium of the husband." The doctrine of the supreme court in that case, then, in my understanding, is not that stated by the chief justice, but simply this: An alien widow is entitled to dower out of lands *bought* by and *conveyed* to her husband during her coverture, if she bring herself within the enabling statutes of 1802 and 1808, at the time of such buying and conveying; her right of dower in such case attaching, as Ch. J. Savage says, when the husband made the purchase, by reason of her capacity to buy and hold real estate, and the grant and conveyance to her husband enuring so far to her benefit. To my mind, it seems to be in direct contradiction, not only to the declared policy and express language of the statute, but equally so to the decision itself in the case of *Sutliff v. Forgey*, and the reasoning on which Ch. J. Savage and his associates founded it, to assert that that decision can conclude the case when the lands in question were bought by a *native citizen* six years *before marriage*, and when the marriage itself took place *anterior* to the passing of the earliest enabling statutes, and when no right of dower vested at the time, or could have been by any constructive inference of law within the intent of the parties to the marriage contract. It is a leading rule of interpretation of statutes, that they are to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. This," says Chancellor Kent, 1 *Kent's Comm.* 462, "has been the language of the courts in every age." The extension of the doctrine of *Sutliff v. Forgey* to the latitude in which it is stated by Ch. J. Nelson, so as to cover a case like the present, would be to effect an innovation upon the common law, by construction of statutory language, far beyond what the statute itself declares to be its own object,

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and "what the case requires." For the same reason, and upon the same principle, any judicial decision, however high in authority, establishing an obvious innovation upon the general rules of law, (whether of common law or of statutory enactment,) should be taken strictly, and not held by mere inference to cover more than is included in the facts of the particular case and the express ground upon which the court have placed their decision. It is true, that in this court, the opinion of Senator *Colden* went further, but there is no evidence that the cause was decided here on that ground alone; nor, considering the peculiar constitution of this numerous court, can we consider the decision here in any other light than in that in which Ch. J. *Nelson* himself regards it, "as simply an affirmance of the doctrine of the supreme court," without reference to the peculiar and perhaps solitary opinion of an individual member.

But, in addition to these principles and reasons, there is yet another and larger view of the whole case, which I deem peculiarly appropriate to the special consideration of this court, organized as it is by our constitution, for the great conservative objects of preserving a liberal spirit of equity in our judicial administration, united with a prudent, cautious and equal legislation. This is one of the cases, frequently occurring, to which we should apply the great principle of strictly guarding against all *retroactive* effects of legislation upon the previously acquired rights of individuals, without express assent of all concerned. This is the vital and conservative principle of safe and just legislation, and it ought never to be lost sight of in the judicial interpretation of the laws. Every legislative interference with rights previously acquired under the faith of then existing laws, however limited in amount or insulated in character, is wrong in itself, and though it should cause little immediate evil, is most dangerous as a precedent. It goes to shake the security of property, and consequently to darken the hopes of enterprise, and paralyze the labors of honest industry. Whilst, therefore, it is the duty of the legislator to refrain constantly from any such abuse of power, it is not less the part of the wise and prudent

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judge to give such a construction to legislative enactments, as will constantly, with any reasonable interpretation of language, support and maintain this fundamental principle of private rights and equal law. The retroactive operation of any law, so as to divest previously vested interests, is never to be presumed. To return to the case before us. Cummings, the deceased husband, had, before the statute, and before his wife's naturalization, a full estate in the lands in question, unencumbered by dower. His creditors (for he was a *debtor*, as is manifest from his bankruptcy soon after,) had a just, it may be a legal lien upon his whole estate; and if the lien had been actually that of judgments, the operation of the retrospective right of dower would divest that lien to the extent of the dower. Now, is it not contrary to the most valuable principle of our laws, that any act, either of congress or of our state, should be so construed as retrospectively to grant to the wife or widow the right of dower in lands which were but yesterday wholly covered by the rights of others—by those of her husband's creditors, or of purchasers from him, or of subsequent parties deriving title from those, long after. Nor would the present be a single and insulated case, arising under such a construction of this law. So numerous are the naturalized citizens, whose wives, children and near relatives resident among us are still aliens, that other cases more or less similar might arise every day. If this retrospective legislation is just in one case, why not in another; and where is the line to be drawn which can securely fence any honestly acquired right of property from the unexpected intrusion of some grantee of legislative bounty?

I should be unwilling to believe that to be a sound construction and interpretation of the law of the land, that could lead to such a conclusion in any instance. On the other hand, the conclusion at which I have arrived, from an examination of the statutes and the authorities, (without regarding this special consideration,) are such as lead to no such dangerous results. If the law be, as I confidently think it must be, in opposition to the high authorities in our courts that have decided otherwise, it can interfere with no former rights whatever, either directly or indi-

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rectly. It affects none but those of the alien himself, by his own consent, and that of the state whose bounty or liberal policy relieves him from prior disabilities.

By Senator WAGER. I should be strongly inclined to reverse the judgment of the court below, if it could be done without overruling one of the decisions of this court made in a case which I hold to be directly in point. I allude to the case of *Forgey v. Sutliff*, 5 Cowen, 713. I think the court there mistook the rule which should be applied in the construction of the enabling statutes ; but that decision now constitutes the law of the land, and we cannot overturn it without violating a more essential principle than the one which was violated by the court in making the decision. In correcting an error we should commit a greater.

The case of *Forgey v. Sutliff*, is imperfectly reported, but enough can be learned from it, as found in 1 Cowen, 89, to show that the court intended to hold that an alien widow might take her dower by virtue of the enabling statute of the 26th March, 1802, as a purchaser, and not by virtue of the naturalization of her husband. This idea, derived from an examination of the case as reported in 1 and 5 Cowen, is confirmed by a perusal of the opinions of Chancellor Sanford and Senator Colden, delivered for affirmance in this court, copies of which have been furnished by the counsel for the defendant in error in this cause, to the members of the court since the argument ; they not having been fully reported in 5 Cowen. The chancellor, in his opinion, regards the widows taking under the enabling statutes, as a taking by *purchase*, within the meaning of that statute, though upon strict principles of law, a widow takes her dower neither as purchaser, devisee or heir. Senator Colden, in the opinion delivered by him, takes the two grand divisions of the modes of acquiring real property, *descent* and *purchase*, as embracing all ; under the latter of which, he held that the widow of Sutliff took her dower ; and that, consequently, she came within the act of 26th March, 1802. The preamble to that act recites the inducements that operated upon the legislature for its passage. It was

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to encourage aliens to come and reside in this state and invest their capital, by means of which agriculture and manufactures might be improved. Having, therefore, strict regard to the objects of the law, the terms "*purchases of land made or to be made,*" would not apply to the widow's right of dower, but would be confined to purchases by bargain and sale. But as I have before remarked, this court have decided this point against my opinion, and it is no longer an open question.

The only difference between this case and that of *Forgey v. Sutliff* is, that here Mrs. Cummings was an alien wife of a natural born citizen, and in *Forgey v. Sutliff* the claimant was an alien wife of a naturalized citizen, during the seizin of their husbands. It was, in that case, contended that the naturalization of the husband naturalized the wife, and that she therefore took as a naturalized citizen. But this doctrine was repudiated by the court, and the case was left to turn solely upon the point, whether she took under the act of 1802, as a purchaser. The naturalization of Sutliff conferred upon him all the rights of a citizen, in relation to taking, holding, and conveying real estate. Such rights, only, had the husband of the present claimant. As citizens, they stood upon equal ground, and their widows should be held to claim their dower upon the same ground.

There were other important points discussed in this cause, but as they have all been disposed of in a perfectly satisfactory manner by the court below, I shall content myself with the above remarks and vote for an affirmance of the judgment.

On the question being put, *Shall this judgment be reversed?* the members of the court divided as follows:

*In the affirmative:* The CHANCELLOR, and Senators J. BEARDSLEY, BECKWITH, HULL, HUNTER, E. P. LIVINGSTON, H. A. LIVINGSTON, LOOMIS, MAYNARD, SKINNER, VERPLANCE, WILLES—12.

*In the negative:* The PRESIDENT OF THE SENATE, and Senators DOWNING, HUNTINGTON, LACY, LAWYER, LEE, SPRAKER, WAGER—8.

Whereupon the judgment of the supreme court was REVERSED.

## Cochran v. Van Surlay.

## COCHRAN and wife vs. VAN SURLAY.

A private act of the legislature authorizing the sale of the estate of infants, for their maintenance and education, is within the scope of the legitimate authority of a state legislature.

Such act is constitutional; it neither violates the provision of the constitution of this state, adopted in 1776, viz. that no member of this state shall be disfranchised or deprived of his rights, unless by the law of the land or the judgment of his peers; nor the provision of the constitution of the United States inhibiting the passage of laws impairing the obligation of contracts.

Where an act for the sale of the estate of infants required the assent of the chancellor, an order for sale to be made by him, and an investment of the proceeds, so as to secure to the infants at least the principal of the purchase money; and the chancellor in his order authorized the proceeds of the sale to be applied, among other things, to the payment of the debts of the father of the infants, and a sale took place and a conveyance of the property executed: It was held that, the chancellor having jurisdiction in the matter, no error committed by him in directing the application of the proceeds in a manner different from that provided by the legislature could affect the title of a bona fide purchaser, in an action at law, brought by the infants for the recovery of the property.

Where the order of sale authorized the trustee to sell, or to mortgage or to convey the premises in satisfaction of any debt owing by him, requiring, however, that every sale, and mortgage, and conveyance in satisfaction, should be approved by a master, by a certificate endorsed on the deed; and a sale for cash took place, and a deed was executed without the approval of the master obtained, it was held, by a majority of the court, that the approval of a master was necessary only in the third alternative, specified above, and that consequently the deed executed on a sale for cash was valid, notwithstanding the want of such approval.\*

EXAM from the supreme court. This was an action of ejectment brought by *Isabella Clarke*, who after the verdict rendered in the cause married *R. J. Cochran*, after which the suit was prosecuted in their joint names. The plaintiff claimed to recover

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\* Senator VERPLANCE, in the opinion delivered by him in this case, controverts the position "that acts of the legislature contrary to the first principles of right," are void. He denies the power of the courts to annul an act of the LEGISLATURE, by declaring it void on the assumed ground of its being contrary to natural equity; and insists that such power can properly be exercised only when clearly derived from express constitutional provisions, (and those strictly construed, limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberative wisdom of the nation.



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under a devise contained in the will of *Mary Clarke*, executed on the 6th April, 1802, whereby the testatrix gave a certain portion of a farm owned by her at *Greenwich*, called *Chelsea*, and also a house and lot then occupied by one *Thomas Byron*, to *Benjamin Moore*, and two other persons, in trust: 1. To receive the rents, issues and profits thereof, and to pay the same to *Thomas B. Clarke*, son of her late son *Clement*, during his natural life; 2. From and after the death of *Thomas B. Clarke*, to convey the premises to his *lawful issue*, in fee; and 3. If he should not have lawful issue, then to convey the premises to *Clement C. Moore*, a grandson of the testatrix, and to his heirs. *Thomas B. Clarke* died in 1826, leaving three children, and this action was brought by one of them, to recover the *third of three lots* of land, part of the portion of the farm at *Greenwich*, devised in trust as above stated. The defendant claimed title to the premises under a deed executed by *Thomas B. Clarke*, the father of the plaintiff, to *George De Grasse*, bearing date 2d August, 1821, whereby 39 lots, part of the *Greenwich* farm, and including the three lots in question, were, for the consideration of \$2000, sold and conveyed to the grantee, who, on the 28th March, 1822, conveyed the 39 lots, with 4 other lots, to the defendant, for the consideration of \$1200, subject to a mortgage of \$1000, executed by *De Grasse*. The defendant claimed that *Thomas B. Clarke* was authorized to execute a *valid conveyance* of the property granted by him to *De Grasse*, by virtue of *certain acts of the legislature*, passed in reference to the property above specified; and also by virtue of *certain orders of the court of chancery*, made under two of the said acts authorized and ratified by a subsequent act of the legislature. The first act passed upon the subject authorized the *partition* of the property at *Greenwich* into two moieties; one moiety to be *subdivided into lots* and *sold*, together with the house and lot occupied by *Byron*, and the proceeds invested in stocks or real securities, for the purpose of *creating an income* for the benefit and support of *Thomas B. Clarke*, his family and children; the *principal* to be paid after the death of *Thomas B. Clarke*, according to the trusts

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of the will of Mary Clarke. This act was passed in 1814, upon the petition of Thomas B. Clarke, and with the concurrence of the *trustees* named in the will of Mary Clarke and of *Clement C. Moore*, the contingent remainder-man. In 1815, a further act was passed, reciting that Clement C. Moore, the remainder-man, had conveyed his contingent interest to Thomas B. Clarke, and then authorizing Clarke to do and perform every act in relation to the property which the act of 1814 had directed might be performed by trustees, to be appointed by the chancellor; but no sale was to be made by Clarke, until he had procured the assent of the chancellor, and when a sale was made, the proceeds were to be invested, and an annual account of the *principal* rendered; but the *interest* Clarke was authorized to apply to his *own use and benefit, and for the maintenance and education of his children*. In July, 1815, the chancellor made an order assenting to the sale of a *moiety* of the Greenwich property and of the *house and lot* occupied by *Byron*, and directed that the proceeds of the sale should be applied to the payment and discharge of the *debts then owing by Clarke and to be contracted for the necessary purposes of his family*, and the residue placed at *interest* on real security upon trust that so much of the *income* as might be necessary should be applied to the suitable and proper maintenance and support of Clarke, his wife and children, and for the suitable education of his children, and that the *principal* should be held for the benefit of the *issue* of Clarke living at his death. In 1816 a further act was passed, authorizing Clarke, under the order theretofore granted by the chancellor or any subsequent order to be made, to *sell the premises* which the chancellor had permitted or might thereafter permit him to *sell*, and to apply the proceeds to the purposes required or to be required by the chancellor under the acts before passed by the legislature. In March, 1817, a further order was made by the chancellor, authorizing Thomas B. Clarke to *sell and dispose* of the southern moiety of the estate at Greenwich; also authorizing him to *mortgage* all or any part or parts of the said moiety, if in his judgment it would be more beneficial to mortgage than to sell the same; and also authorizing



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him to convey any part or parts of the said moiety in payment and satisfaction of any debt or debts due and owing from him, upon a valuation to be agreed on between him and his respective creditors, "provided nevertheless, that every sale and mortgage "and conveyance in satisfaction, that may be made by the said "Thomas B. Clarke in virtue hereof, shall be approved by one "of the masters of this court, and that a certificate of such approval be endorsed upon every deed or mortgage that may be made "in the premises." The several statutes above referred to are to be found in the *Statutes, sess. of 1814, p. 77; sess. of 1815, p. 91; and sess. of 1816, p. 57.* On the trial of the cause the defendant offered to read in evidence a *certificate of approval* by a master, bearing date 5th March, 1832, endorsed on the deed from *Clarke to De Grasse*. The plaintiff objected to its being received in evidence, and the objection was sustained by the judge. A verdict was entered for the plaintiff by consent, subject to the opinion of the supreme court upon the facts to be presented in a case. Upon the case made the supreme court rendered judgment for the *defendant*. See opinion delivered by Mr. Justice *Bronson*, on giving judgment, 15 *Wendell*, 439, *et seq.* The plaintiffs sued out a writ of error, and the case was now presented in the form of a special verdict. The cause was argued here by

*D. B. Ogden*, for the plaintiffs in error.

*J. Anthon*, for the defendant in error.

*Points on the part of the plaintiffs in error.*

I. The acts of the legislature destroyed the will of Mrs. Clarke, the testatrix from whom the plaintiffs claim, and the vested rights under the will, and were therefore against the constitution of New-York. *Former Const. of State of New-York, § 13.*

2. The orders in chancery made, or supposed to be made under those acts, are for the same reason void.

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3. The acts of the legislature are repugnant to that part of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. *Const. U. S. art. 1, § 10.*

4. The act of a legislature is void if it be the exercise of power against law and reason. 1 *Bay*, 252. *Van Horne v. Dorance*, 3 *Dallas*, 303.

5. In the acts of the legislature and orders of the court of chancery, the rights in remainder of the children of Thomas B. Clarke were not protected, because they were not represented by guardian before the legislature, or in the court of chancery. Clarke, as the father and general guardian of the children, could not represent them on these occasions. 2 *Black. Comm.* 345. *Catlin v. Jackson*, 8 *Johns. R.* 405.

6. The deed under which the defendant claims title is void, because it is not given in pursuance of the acts of the legislature and orders in chancery. The order in chancery required that a certificate of a master should be endorsed on the deed at the time of its execution and delivery, approving of the circumstances under which it was given. No such certificate was endorsed at such time. The subsequent certificate put upon the deed after the commencement of this suit, and the death of the grantor, is an evasion of the order, and a fraud upon the rights of the children.

7. The certificate endorsed upon the deed is an admission that the deed was given for debts contracted. If the deed had been given by Clarke as trustee on a cash sale, that important fact would have been made to appear.

8. The conveyance under which the defendant claims title, is a breach of trust. All grants from that source are vitiated by fraud. The first purchaser knowing that he was dealing with a trustee, was bound to look to the remainder rights of the children, and see that the trust was fulfilled.

*Points on the part of the defendant in error :*

1. The several acts of the legislature, having been enacted

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with the express view of benefitting the infants, by procuring a maintenance for them from unproductive property, are valid. *Sinclair v. Jackson*, 8 Cowen, 543. 2 Black. Comm. 344, 345. *Cruise's Dig.* 33, tit. *Private Acts*.

2. The orders of the chancellor have in all things conformed to the statute, and are obligatory.

3. The conveyance to De Grasse, under whom the defendant claims title, was a sale for a valuable consideration, under the chancellor's order, and conformed to it.

4. The certificate of a master was not necessary, according to the proper interpretation of the chancellor's order, to give validity to such a sale; it is confined to conveyances in payment of Clarke's debts.

5. If such certificate was necessary to a sale for valuable consideration, no time being fixed in the order, a certificate obtained at any time after the sale, will satisfy the order of the chancellor; and such certificate was obtained in this case.

6. Whether the orders conformed to the statute, and the deed to the orders, is a question for the chancellor, and not for the supreme court, he alone having power to compel the plaintiff to do equity by returning the consideration money, should he consider the deed to deviate from his order.

7. The supreme court cannot take cognizance of the matter without infringing on the exclusive jurisdiction of the chancellor.

After advisement, the following opinions were delivered :

By the CHANCELLOR. In the examination of this case it is proper to take into consideration the fact that we are acting as a court of law, and are endeavoring to ascertain whether the legal title to the premises is in the plaintiffs; for if it is not, then they cannot recover in this suit, whatever may be their equitable rights as against this defendant or any other person; and if the legislature had the right to pass the acts in question, then it will not be necessary to inquire whether the original trustees were

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guilty of a breach of their duty in consenting to improvident acts of legislation, in consequence of which the rights of these complainants may have been sacrificed. On the other hand, if the acts are unconstitutional and void, it is not in the power of this court, in an ejectment suit, to inquire whether the defendant has an equitable lien or claim upon the premises for the purchase money which has been applied to the support and education of Mrs. Cochran during her minority, or for any buildings or improvements which have been made upon the premises in good faith, under the supposed title acquired under the acts of the legislature and the orders of the court of chancery. The two questions proper for consideration in this suit, therefore, are, 1. Whether the legislature exceeded its constitutional powers in passing the acts of the 1st of April, 1812, the 24th of March, 1815, and the 29th March, 1816 ; and 2. If those acts were constitutional, whether they have been carried into effect, under the orders of the court of chancery, so far as to vest the legal title in the grantee of Thomas B. Clarke, under whom the present defendant claims.

If the laws are unconstitutional, it must be either because they impair the validity of a contract, and thus conflict with the constitution of the United States, or because they are inconsistent with the state constitution, in taking the property of infants and applying it to purposes not previously authorized by law, and which could not benefit them. There is not any contract which has been violated in this case by the legislature, within the meaning of that clause of the constitution of the United States which prohibits the state legislatures from passing any laws impairing the obligation of contracts. In the case of *Fletcher v. Peck*, 6 *Cranch's R.* 87, the supreme court of the United States decided that this prohibition in the constitution applied as well to rights vested under *executed contracts* as to rights under such as were *executory* merely ; and that the act of the legislature of the state of Georgia which attempted to divest the title to land which had been vested in the grantees of the state under the power conferred upon the governor, as its agent,

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by virtue of a previous act authorizing such grant, was therefore unconstitutional as to *bona fide* purchasers who had acquired a legal title to the land under that grant. The language used by Chief Justice *Marshall*, in delivering the opinion of the court in that case, has been supposed by some to mean that every right vested in an individual or body corporate was in the nature of a contract executed ; and therefore within the protection of this clause of the constitution ; and certainly the strong language used by him, in that case, is calculated to convey that impression if his language be not carefully examined and applied to the case then under consideration. But that impression is entirely removed when we refer to a subsequent decision of the same court, pronounced by another of its members, but while that distinguished judge still occupied his seat on the bench. In the case of *Satterlee v. Matthewson*, 2 *Peters' R.* 380, which came before that court in 1829, on a writ of error to the supreme court of the state of Pennsylvania, the question arose whether a legislative act of the state changing the law, as it had been declared settled by the highest judicial tribunal of the state, in a suit between the same parties, was not, as to the party who had acquired rights under such decision of the court, a violation of this provision of the United States constitution. The supreme court of the United States there decided that the provision of the constitution did not extend to vested rights which were not thus vested under a contract, the obligation of which was impaired or destroyed by the state law. In delivering the opinion of the court, in that case, Mr. Justice *Washington* says : " The objection, which was most strongly pressed upon the court, and relied upon by the counsel for the plaintiff in error was, that the effect of this act was to divest rights which were vested by law in *Satterlee*. There is certainly no part of the constitution of the United States which applies to a state law of this description ; nor are we aware of any decision of this court or of any circuit court, which has condemned such a law upon this ground, provided its effects be not to impair the obligation of a contract, and it has been shown that the act in question has no such effect

upon either of the contracts which have been before mentioned. In the case of *Fletcher v. Peck*, it was stated by the chief justice that it might well be doubted whether the nature of society and of government do not prescribe some limits to the legislative power ; and he asks, if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation ? It is no where intimated in that opinion that a state statute which divests a vested right is repugnant to the constitution of the United States." After this decision of the court of dernier resort, upon a question as to the construction of the federal constitution, it would be improper for us, even if we should differ with that court in opinion, to declare the acts of the legislature in question in the present case void, on the ground that they were repugnant to that provision of the constitution of the United States.

But, as I have frequently had occasion to observe, an act of the legislature which would have the effect to divest an individual of his property and transfer it to others for their own benefit, without compensation, or where there was no reason to suppose the person whose property was thus taken would be benefitted thereby, and contrary to the settled principles of law, would be void, as being against the spirit of our state constitution, and not within the powers delegated to the legislature by the people of this state. It is clearly, however, within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superintendence, disposition and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs. But even that power cannot constitutionally be so far extended as to transfer the beneficial use of the property to another person, except in those cases where it can legally be presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself—as in the case of a provision out of the estate of an infant or lunatic, for the support of an indigent parent, or other near relative. Testing the legislative acts in question by these

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rules, I cannot see that they infringe either upon the letter or the spirit of the state constitution, so far as the rights of the children who were in existence at the time of the passage of those acts were concerned. It is true, that by the terms of Mrs. Clarke's will, the children of T. B. Clarke, then in existence, had only a contingent interest in the remainder of the estate after his death ; or rather it was a vested remainder subject to open and let in after born children, and which was liable also to be divested by the death of the children during the lifetime of their father. It was, therefore, contrary to the settled principles of law to authorize a sale of the contingent interests of persons not then in existence, for the purpose of providing a maintenance for those who might not eventually be entitled to any interest in possession in such remainder.

But it is a settled rule of the *court of chancery*, that where a future estate or interest in property is given to several infants as a class, with the right of survivorship as between themselves, a provision for the maintenance of each may be allowed out of the fund, although, as in this case, it may eventually be found that some of them do not become entitled to an interest in the fund in possession, and that the whole belongs to the survivors. The principle upon which the court proceeds, in such a case, is, that although it may eventually turn out that some of the children may not be entitled to any portion of the fund, yet as the chances of survivorship are equal, no injustice can be done to either, by providing for the present support of all out of a fund which presumptively belongs to all in equal proportions. But where, by the provisions of the conveyance or will, under which the property or fund is held, other persons may eventually be entitled to such fund or property, it cannot be taken and applied to the support of those who are presumptively entitled to the same, without the consent of those who may become entitled to the same under such contingent limitation. *Ex parte Keble*, 11 *Vesey*, 604. *Canning v. Flower*, 7 *Sim. R.* 523. And where the contingent limitation over is to persons not in existence, or whose consent cannot be obtained, the fund cannot be appropriated for the

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support of those who are only presumptively entitled to the same, and whose interest therein may never vest in possession. *Errat v. Barlow*, 14 Ves. R. 202. *Turner v. Turner*, 4 Sim. R. 430. For this reason, the chancellor was not authorized to direct a sale of the interest of the children of T. B. Clarke in the property in question, for their maintenance and education, under the general act concerning infants, Laws of 1814, p. 128, unless the purchaser was willing to take the title, subject to the contingent rights of other persons who might eventually become entitled to an interest in the premises under the limitations in the will of Mrs. Clarke; and as the value of such contingent interests could not be ascertained by any known rule of compensation, the chancellor would not authorize a sale, unless the purchaser would pay the full value of the property, subject to the father's life estate, and without reference to such contingent interests. For the same reason, the legislature probably could not by these special acts authorize a sale of the property, so as to affect the contingent rights of persons not then in existence, who might thereafter become entitled to the same, under the limitations in the will. Were the rights of any such persons now in controversy in this cause, there might be some reason to doubt the constitutionality of these acts of legislation, so far as *those rights* were affected thereby; but, as in the event which has occurred, no persons, except three of the children who were in existence at the time these acts were passed, became entitled to any interest in the remainder limited upon the life estate of T. B. Clarke, those children cannot legally complain that the legislature passed laws which might have been unconstitutional as to other persons, in a different event. In testing the constitutionality of these acts in reference to the rights of the plaintiffs in error, the case is to be considered in the same light as if the limitation of the remainder had originally been to the six children in fee, with a right of survivorship in favor of such of them as should be living at the termination of the life estate of their father; in which case, as we have before seen, the court of chancery might apply a fund in which all had an equal interest, presumptively, for the com-



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mon and equal benefit of all. Indeed, it is a settled principle, that whenever the property of infants consists of real or personal estate, the legal title to which is in *trustees*, the chancellor, as the general guardian and protector of the rights of all infants, may authorize such a disposition thereof, as he in the exercise of a sound legal discretion, may deem most beneficial to such infants, provided the rights of other persons are not prejudiced thereby. The only restrictions upon that power, are those which the court, has from time to time imposed upon itself, in the nature of general rules to regulate the exercise of such discretion, and those imposed by certain provisions of the Revised Statutes rendering trustees incapable of transferring the title to trust estates, in contravention of the trust expressed in the instrument creating such estates. The same power is given to the chancellor over the legal estates of infants by the several acts in relation to the sale of infant's estates, subject, however, to the limitation imposed by the legislature, that such estates shall not be sold or disposed of contrary to the provisions of the will or conveyance, by which the estate was devised or granted to the infant. It seems therefore to follow, as a necessary consequence, that the legislature must have the constitutional power to pass special laws authorizing similar dispositions of the estates of infants for their benefit, either with or without restriction, where an infant or class of infants are entitled to the whole beneficial interest in the property, especially where such disposition is directed to be made under the superintending control of the court of chancery.

I do not find any thing in the special verdict to justify the allegations of counsel, that these acts were not for the benefit of the infants, but for the benefit of T. B. Clarke merely. As the father, where he is of sufficient ability, is bound to support his infant children, if it had been found by the special verdict that T. B. Clarke had ample means for that purpose, then it certainly could not have been for the interest of the infants that their future estate in the property should have been sold and applied to that use, and the trustees, in that case, would probably have

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been guilty of a breach of trust in consenting to the passage of an act of the legislature authorizing such a sale, in case the infants eventually sustained any damage in consequence thereof; but it is stated in the act of April, 1814, that it appeared to the legislature that the property devised to the trustees was nearly unproductive, and that in its then situation it was incapable of being improved, so as to yield an adequate income for the support of T. B. Clarke and his family, whereby the intentions of the testatrix would be defeated without the interposition of the legislature; and this statement must be taken as true, until the contrary is found to be the fact. It is a matter of public notoriety, that a life estate in vacant city lots is of comparatively little value, and frequently is not equal to the taxes and extraordinary assessments charged thereon. We may therefore readily imagine that the owner of such an estate was unable to support himself and wife, with six children, out of the income thereof, and that he might be compelled to encumber his life estate to furnish the means of support. The act of 1814, therefore, appears to have been a very proper exercise of the legislative power, and the accumulating fund provided for by the third section of the act, I presume, afforded an ample equivalent for the part of the future estate of the children which was taken for the immediate support of themselves and their parents. By that act the trustees were discharged, and the legal title to the premises was to vest in the new trustees to be thereafter appointed by the court of chancery. By the first section of the act of March, 1815, the equitable life estate of T. B. Clarke in the premises was converted into a legal estate, which was perfectly proper, as its conversion from an equitable to a legal estate could not possibly affect the rights or interests of any other person. And although it might not have been a discreet act of legislation to vest the legal title of the residue of the trust estate in T. B. Clarke, as is done by the operation of the second section of that act, no one can say it can have been an unconstitutional exercise of power, even if his general powers, as trustee for his infant children, had not been expressly restricted by the super-

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intending power and control of the chancellor, and by requiring the assent of that officer to any sales to be made.

But it is supposed that the act of March, 1816, is liable to the constitutional objection that it sanctions the order of the chancellor which appropriated the proceeds of the children's property to pay off debts of the father, and which were not contracted for their benefit. I cannot perceive, however, that the order is liable to that objection. It is true the mortgage to the Manhattan Company, given in 1806, could not have been given for a debt incurred for the support and maintenance of children who were born long afterwards; but it must be recollected that T. B. Clarke had himself a life estate in the whole premises, which might legally and properly be taken for the purpose of paying the debts then due to his creditors, although no part of those debts were contracted for the support or education of his infant children; and unless such debts exceeded the value of his life interest in the premises, it was not improper to direct them to be paid out of the proceeds of the sale of the premises; as the proceeds of the life estate of the father could not be taken and appropriated for the support of his children, to the prejudice of the rights of creditors who had a prior claim to his property. The jury have not, by their special verdict, found that the order of the chancellor had the effect to take the proceeds of their future interest in the property, and to apply the same in payment of the father's debts, without giving to them a corresponding benefit, in the support which they thereby obtained out of the income of his life interest in other parts of the property; we therefore cannot presume that the court of chancery made an order which would produce that result, or that the legislature intended to authorize or sanction such an order.

If the chancellor, in the exercise of a proper power confided to him by the legislature, for the purpose of protecting the rights of those who were infants and incapable of taking care of their own rights, has not exceeded his jurisdiction, but has merely erred upon the question whether such sale as he authorized would eventually be for their benefit, Justice *Bronson*, who delivered the opinion of the supreme court, was clearly right in supposing

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that the decision of the court of chancery could not be reviewed in this collateral way. By the act of 1815, Clarke was authorized to sell and convey the legal title and the beneficial interests of the children in the remainder, as well as his own life estate in the premises, with the assent of the chancellor; and if that assent was given to the sale to De Grasse, those claiming under the conveyance to him have a valid title to the premises in question, which certainly cannot be disturbed at law.

The only doubt I have had in this case, was upon the question whether, by the order of the 15th of March, 1817, the chancellor did not intend to require *every sale for cash* to be approved by a master, *as well as sales or conveyances* which might be made by the trustee *in payment or satisfaction of debts*. Upon this point I concur, though with some hesitation, in the conclusion at which the justices of the supreme court arrived, that the restriction was only intended to apply to sales and conveyances in satisfaction of debts at a valuation to be approved of by a master, according to the prayer of the petition upon which that order was founded. The legal title to the premises in this case, therefore, passed to the purchaser thereof for cash, although the conveyance from Clarke, as the substituted trustee under the statute, was not approved of by a master, as it should have been if the property had been conveyed to a creditor of the trustee in discharge of a debt due from the latter.

For these reasons I shall vote for an affirmance of the judgment of the supreme court.

By Senator VERPLANCK. The first ground upon which the plaintiffs in error seek to avoid the sale made by Clarke under the several acts of the legislature, is their alleged unconstitutionality : 1. as against the former constitution of this state, under which they were passed ; and 2. as repugnant to the provisions of the constitution of the United States, which inhibits every state from passing any law impairing the obligation of contracts. I concur with the supreme court in supporting the constitutionality of the acts under which the sale, now impeached, was made. The first two acts, certainly and clearly, and the third one upon

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the face of it, and as far as a natural and obvious construction would carry it, go no further than the exercise of that paternal power over the persons and property of infants, which under the common law was an inherent right of sovereign power, and may be exercised either by general laws, or, under peculiar circumstances, by special legislation. The chancellor has, without the aid of positive legislation, a large jurisdiction over the property of infants, to be exercised for their benefit ; and this jurisdiction, as was said by Lord Chancellor Hardwicke, in *Butler v. Traver, Ambler*, 302, "is a general right delegated by the crown, as *pater patriæ*, to interfere in particular cases for the benefit of such as are incompetent to help themselves." This doctrine, I know, has been recently called in question, but certainly without good reason, since Lord Redesdale, adding his own high authority to that of the long succession of English chancellors, says, "Lord Chancellor Somers, Lord Chancellor Northington, Lord Chancellor Hardwicke, and every other chancellor, has placed the jurisdiction on that ground." Whilst our own Judge Story thus sums up the discussion : "The doctrine now maintained is, that the general superintendence and protective jurisdiction of the court of chancery, over the persons and property of infants, is a delegation of the rights and duties of the crown." 2 *Story's Comm. Eq. Law*, 565. The same power, then, which the sovereign authority has a right to delegate generally, it may certainly exercise specially in the discretion of its officers ; for the authority is not judicial, but rather parental or tutelary. The same constitutional authority which empowered our state sovereignty to pass general laws for the management of infants' estates, such as have been heretofore enacted, and now form in another shape, a part of our revised code, could not but be competent to legislate for a particular case in which there occurred the same difficulties ; which becoming more common, were afterwards more widely guarded against by laws of universal application. They contemplated only a change of unproductive real estate into productive personal property, the income of which was to be applied to the benefit of all interested therein. The last act authorized

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Clarke to sell the property, with the permission of the chancellor, and to apply the proceeds "to the purposes required or to be required by the chancellor under the former acts." The chancellor had already authorized the application of a part of the proceeds to the payment of Clarke's former debts. This order seems to me repugnant not only to the letter and intention of the devise, but also to the former acts, and in derogation of the rights of the infants. I should therefore think that it was not confirmed by the third act, which did not recite or confirm *eo nomine*, any particular order, but looked only to orders in conformity with, or "under the acts heretofore passed" on this subject, both of which limited the application of the money to the support of Clarke and his children, from the *interest* only. If this construction be correct, there can be no question as to the constitutionality of the acts, and the question will be as to the conformity of the orders with them.

But the words of the third act may admit of a broader construction, and such an one the chancellor appears to have given to them at the time of his last order. They may, perhaps, be construed as confirming expressly the order before granted, whether in conformity with the former acts or not, and thus authorizing the application of the *principal* of monies, which those acts reserved for the ultimate benefit of the children, to the payment of past debts of the father. This, however unwise or unjust it might have been, would not, in my view, shake the constitutionality of the act itself, according to the old constitution of 1776, under which it was passed. The only clause in that constitution which is alleged to bear upon the question, is that which declares that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this state by this constitution, unless by the law of the land or the judgment of his peers." I must say with Mr. Justice *Bronson*, (even taking the operation of the act most strongly as depriving the infants of a portion of their property,) that I cannot see that they are deprived of any right expressly secured to them under that constitution. It is difficult, upon

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any general principles, to limit the omnipotence of the sovereign legislative power, by judicial interposition, except so far as the express words of a written constitution give that authority. There are indeed many *dicta*, and some great authorities, holding that acts contrary to the first principles of right are void. The principle is unquestionably sound, as the governing rule of a legislature, in relation to its own acts, or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language, if it be susceptible of any other, more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this, would be to place in the hands of a judiciary, powers too great and too undefined, either for its own security or the protection of private rights. It is, therefore, a most gratifying circumstance to the friends of regulated liberty, that in every change in their constitutional polity, which has yet taken place here, whilst political power has been more widely diffused among the people, stronger and better defined guards have been given to the rights of property. Thus in the constitution of the United States, the states have been inhibited from passing any law impairing the obligation of contracts, a power boldly, rashly and wantonly exercised under the old confederation. So again, in the constitution of our own state adopted in 1822, in addition to the general provision of the old constitution already quoted, "that no one shall be deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or

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the judgment of his peers," farther protection is given to property, by adding a prohibition against "the taking private property for public use without just compensation," and also another against "the depriving any one of life, liberty or property, without due process of law :—" i. e. by mere arbitrary legislation, under whatever pretext of private or of public good.

Believing that we are to rely upon these and similar provisions as the best safeguards of our rights, as well as the safest authorities for judicial direction, I cannot bring myself to approve of the power of courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose and vague interpretation of a constitutional provision, beyond its natural and obvious sense. There is no provision of the old state constitution, that, in my understanding of it, so limits the power of the legislature over the property of its citizens, as to enable a court to set aside these statutes, or titles acquired under them, on the ground of unconstitutional enactment. The words of our present constitution are stronger, and under them the result might be different. Nor can I consider the clause of the constitution of the United States, inhibiting any state from "passing any law impairing the obligation of contracts," as bearing upon these acts.

I am well aware that the language and reasoning of Judge *Story*, in his justly celebrated opinion in the great *Dartmouth College cause*, gives an extension to the meaning of the word *contract*, which might perhaps authorize its application to a case like that before us. Such, however, is not the doctrine of Chief Justice *Marshall* or of his brethren, nor do any of the decisions of the supreme court of the United States under this head of constitutional law, rest upon or involve so latitudinarian a meaning. I cannot consider the word *contract* as applying to such a transaction as that upon which the plaintiffs here rest their title, without giving to it an extent of meaning wholly unwarranted by any legal or even any colloquial usage. A *contract* necessarily implies some reciprocity between the parties ; some mutuality of compact between them. But a will absolute in its terms, and unconditional, cannot, by any stretch of terms within the



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limits of legal or of ordinary language, be termed a contract ; still less can an estate absolutely vested under a decree, or if contingent yet contingent only on the casualties of life, not on any condition to be performed, be considered as an executed contract. If such interpretation be allowed, there can be scarcely any state legislation which will not be in danger of being impeached and set aside for unconstitutionality, as touching something that has at some past time or other been the subject of an executed contract. Viewing, as I do, this provision of our federal constitution and the series of wise and salutary decisions under it, as forming the most important safeguard of the rights of industry and labor possessed by the American citizen, I hold that sound political wisdom, not less than correct legal interpretation, should forbid us to press the words of the constitution beyond their original obvious and settled meaning ; and thus to make that prudent and useful check upon legislative indiscretion, odious to the people, by seeking to cover with it the whole of state legislation, and embarrassing its most ordinary and most beneficial operations. Under any view of the private acts in question, I conclude that they were within the constitutional legislative authority ; censurable, perhaps, for want of due caution, but not impeachable for usurpation of power.

The next points of inquiry are, whether the orders of the chancellor empowering the sale by Clarke were not void for want of conformity with the statutes ; and if they did not conform to the acts, whether the sale under them was not a nullity ?

I have already intimated my strong impression (at least as at present advised) that the orders were not in conformity with the acts, and that the third act still confined the chancellor to allow no other application of the proceeds of the sale than was valid under the "acts heretofore passed." But, nevertheless, I am of opinion that the orders were so far valid as to protect a *bona fide* purchaser at a sale made in conformity with them, and to bestow upon him a legal title not to be impeached in a court of law. Beyond this, I cannot go, nor does the case demand it. The order made under the first two acts, was in contravention of the statutes, so far as it allowed a part of the proceeds of the

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sale to be applied to the payment of Clarke's former debts; nor do I think that the words of the act of 1816, ratified the former words or extended the chancellor's powers in future orders as to the liberty of applying the principal of those funds, of which, according to the "acts heretofore passed" on this subject, the *interest* only was to be expended. But Clarke was clearly and directly empowered under the second and third acts to sell the property, after being permitted by the chancellor, or having procured his assent. If, then, he procured the chancellor's assent to the sale, however erroneous the order granting that assent might have been as to the application of the proceeds of the sale, I cannot see how the title acquired under such a sale is to be impeached in a court of law, on the ground of erroneous application of the proceeds. The question of application belongs to the peculiar jurisdiction of equity, and cannot be judged collaterally in a court of law, so as to overthrow indirectly and consequentially a legal title connected with it. The old equity doctrine of application, which required purchasers from trustees to look to the application of the moneys paid by them at the hazard of losing the estate, or paying the consideration twice over, was long ago allowed to be hard and unjust, and recently has been weakened by repeated decisions limiting its extent or explaining away its force; "equity struggling, as has been well said, against its own inequitable rule." In this state, the recent revision of our laws has expunged the rule from our system. This legislative alteration however cannot, as such, affect the present case. But in its largest and most unrestrained acceptance, this rule could never have been carried so far as to make the *bona fide* purchaser's estate, not only dependant upon his seeing that the proceeds of the trust fund went to the person or purpose held out by the court as entitled to receive it, but moreover further dependant upon the right judgment of the court in its decision or its order as to the proper person or purpose entitled to such beneficial interest. Such a distinction would have gone very far to make every sale under the authority of chancery, doubtful and hazardous. What Lord Redesdale has said, in reference to the effect

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of a decretal order, may, for the same reason, be extended to all sales under the authority of the court. "The general impression of all the cases on this head is, that the purchaser has a right to presume that the court has taken the steps necessary to investigate the rights of parties, and that it has on investigation properly decreed a sale." 1 *Sch. & Lef.* 597. Whether or no the purchaser's title under such a sale must be protected absolutely and conclusively, both at law and in equity, or (as I rather think) whether equity might not review the whole transaction and vacate the sale on the return of the purchase money, so as to protect only against actual loss, I am not prepared to say, nor are we called upon to decide. But as the difficulty arises from error in a court of equity, it is in equity alone that the remedy must be sought. Merely to vacate the sale and invalidate the title acquired under it, in a court of law, would be but to inflict an additional and inequitable hardship upon a new party, by attempting to shift the loss from one innocent sufferer to another, even if that power were within the competence of a court of common law. But it is not within such jurisdiction. All these private acts clearly and unequivocally give the right to sell the real estate with the permission of the chancellor; and that authority of sale seems to me good in law, whatever may have been the judicial error in directing the subsequent application of the proceeds. If such error has occurred, and if it can be corrected at all at this period, it is to be corrected only by equity reviewing its own orders, either in the same or a higher court, and adjusting the loss among the several sufferers in their just ratio. I have thus far been led to the very same conclusions on the points under examination with the supreme court, by a course of reasoning somewhat different from theirs, though not in contradiction to it. On the last point I am compelled to differ altogether from their decision.

The sale and conveyance under which the defendant claims title, are impeached as wholly void, because not made in conformity with the express directions of the chancellor in his order. I cannot but consider this objection fatal to the legal title of the

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defendant, as it now stands. By those acts, as was justly said by the then chancellor, in a case arising under them, "the chancellor was virtually made the trustee of the property," *Sinclair v. Jackson*, 8 *Cowen*, 543 ; and no sale, mortgage or conveyance, was valid without his express assent or permission. In his order of March, 1817, he directs in three successive sentences : 1. That Clarke be authorized to *sell* certain property therein described : 2. That he be authorized to *mortgage* said property ; and 3. "The said Clarke is further authorized to *convey* any part thereof in payment or satisfaction of any debt due from him, on a valuation to be agreed upon between him and his creditors, provided, nevertheless, that every *sale*, and *mortgage*, and *conveyance* in satisfaction, that may be made by the said T. B. Clarke in virtue thereof, shall be approved by one of the masters of this court, and that a certificate of such approval be endorsed upon any deed or mortgage that may be made in the premises." Here the words *sale*, and *mortgage*, and *conveyance* in satisfaction, refer directly to the several authorities successively granted to sell, to mortgage, and to convey ; whilst, again, the words "deed or mortgage," must be referred to all the prior sentences, or the word "mortgage" has no effect at all. So Clarke was nowhere authorized to mortgage in satisfaction of debt. For all these powers the approval of a master is necessary, or the power is not granted. Judge Bronson, in pronouncing the opinion of the supreme court, rests the decision of this part of the cause upon rendering the words "in satisfaction of debt," as applying to each member of the whole preceding phrase, so as to mean every sale in satisfaction, every mortgage in satisfaction, every conveyance in satisfaction, whilst the whole proviso has no reference beyond the sentence which it immediately follows. He therefore regards Clarke as having an *absolute power* to sell or mortgage, and only *limited* by requiring the master's assent, to *convey in satisfaction of prior debts*. I must regard this interpretation as in direct hostility with the spirit and intention of the will, and the acts of the legislature, and equally so to those of the chancellor's order ; who would obviously require the

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same guards against an abuse of trust in a sale for cash, or a mortgage, as in a conveyance in satisfaction of debt. Such an interpretation would, therefore, not be probable, was the language ambiguous or doubtful; but I see no doubt or ambiguity in the order. According to the most clear and obvious use of language, the approval of the master is made a necessary condition to every alienation in any way, or for any purpose. It is a plain question of the meaning of words, in respect to which every man must judge for himself. Differing so widely in my understanding of this meaning from the deliberate judgment of the learned court, I cannot speak with the unqualified confidence which I should, had it been presented as a new question; but still, for myself, I must say, with strong disposition to protect if possible the rights of an innocent *bona fide* purchaser, I have not been able to perceive the slightest color for the meaning given by the supreme court. If this understanding of the order be correct, then the sale by Clarke was a nullity without such an approval by a master. Looking merely to the parties, it is a nullity, because it wants the assent of the chancellor, (the virtual trustee) through the officer whom he substitutes to himself. Looking to the conveyance, it is void for want of the performance of that condition precedent which was made essential not merely to the commencement of the estate, but to the very creation of the power of sale.

Nor can an approval by a master with his certificate thereof given eleven years after the conveyance by Clarke, and five years after his death, (when the title had vested in his lawful issue living at his decease) in my opinion aid the legal title under such conveyance. The long interval of time which had elapsed, the death of Clarke, the change in the value of property, would throw doubt upon the transaction, and require explanation and other evidence to support it, were the certificate adduced to enforce an equitable claim for perfecting a title. But we are reviewing the decision of a court of law, and cannot look beyond the legal title as it now exists. In order to obtain a legal authority to sell, I think it was absolutely necessary that Clarke

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should have his contract of sale approved by a master. He neither obtained such approval, (as far as appears) at the time when it ought properly to have been obtained, nor subsequently during his lifetime. No title, therefore, passed at the time by his conveyance, and on his death the legal title passed to his children, by the operation of the devise and our statute of trusts; nor can that title be divested in a court of law by a subsequent approval of a master; especially after claim of the lands and commencement of a suit for their recovery. It is, indeed, possible that the sale might have been approved at the time, and from some neglect the proper evidence required, not duly endorsed on the deed. Of this, we have no evidence, nor if we had, could the court below take cognizance of it. But if such were the fact, it would form one of those cases of defective execution which equity could relieve, and equity alone. If the defendant has such a protection to her title, she must go to chancery to give it validity and effect.

As the case now stands, I am of opinion that the judgment of the supreme court should be reversed, on the single ground that the sale and conveyance by Clarke not having been approved by a master until years after his death, when the title had passed to the present plaintiffs, were void and inoperative.

On the question being put, *Shall this judgment be reversed?* seven members of the court voted in the *affirmative*, and twelve in the *negative*.

Whereupon the judgment of the supreme court was **AF-  
FIRMED.**

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## DE GROOT vs. VAN DUZER.

Where a *banking company*, incorporated in another state, kept an office in the city of New-York for the purpose of discounting notes and issuing bills to be put in circulation as money, and the president of such company entered into an agreement with a *broker* of New-York to receive of him all notes of the banking company which he should procure in his business as a broker, and pay him the amount thereof in cash, deducting a discount of one-eighth of one per cent., IT WAS HELD, on *demurrer* to pleas alleging those facts and *averring* that the agreement was entered into to *aid* the banking company in the above operations, and that by means thereof, and the acts of the plaintiff under the agreement, the banking company was the better enabled to carry on its operations and business of discounting and issuing notes at their office in the city of New-York, that the agreement was *void*, as made with the design to violate the provisions of the statute of this state forbidding all associations (unless expressly authorized so to do) to keep an office within this state, "for the purpose of discounting notes, or issuing bills to be loaned or put in circulation as money."

ERROR from the supreme court. This was an action of *assumpsit*, brought in the superior court of law of the city of New-York by *Van Duzer* against *De Groot*. The plaintiff declared that he being a *stock and exchange broker* in the city of New-York, and in the daily habit of purchasing the notes of the *Washington Banking Company*, an agreement was entered into between him and the defendant, whereby, in consideration that he would deliver to the defendant such notes of the *Washington Banking Company* as he should from time to time procure in his business, to be put up in envelopes, and deposited on *Wednesday* and *Saturday* of each week at the office of a Mr. *Solomons*, in Wall-street; and also, in consideration that he

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\* *Senator VERPLANCK*, in the dissenting opinion delivered by him, holds the agreement to be *valid*, as it is not averred that the plaintiff was a *guilty* participator in the transaction, as far as the violation of the law is concerned, or that he had even deviated from the ordinary course of his business in consequence of the agreement; that his general knowledge, that the arrangement would indirectly *aid* the banking company, did not vitiate the agreement, as he might well be deemed to have had no other intention than to give a general currency to the bills of the bank, and not to aid in the infraction of the law, by the issuing of bills within this state.

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agreed to allow to the defendant a *discount* upon such notes, at and after the rate of *one eighth of one per cent* upon the amount so to be procured and deposited, *the defendant promised to receive and discount such notes so procured and deposited, and to pay to him the full amount thereof.* The plaintiff then avers, that in the course of his business, he purchased and procured a large amount of such notes, to wit, the sum of \$1733; that he put up the same in an envelope in the manner agreed upon, and on *Saturday*, the 28th December, 1833, deposited the same in the office of Mr. Solomons; that he hath always been willing to accept the amount of such notes so deposited, deducting the *one eighth of one per cent.*, but that the defendant would not receive and discount the notes. There was another count similar to the above.

The defendant pleaded the *general issue*, and *specially*, that at the time of the agreement, the *Washington Banking Company*, of which the defendant was *president*, being a foreign body corporate, created by the legislature of New-Jersey, *kept an office in Wall-street*, in which one *J. E. Solomons* acted for them as their agent, for the purpose of discounting notes, checks and bills, and issuing the promissory notes called bank notes of the *Washington Banking Company*, and other promissory notes and evidences of debt to be put in circulation as money, to wit, at the city of New-York, *the said company not being authorized by law so to do*, and that on, &c. at, &c. it was *against the form and effect, true intent and meaning of the statute*, in such case made and provided, agreed, by and between the plaintiff and the defendant, *so being president as aforesaid, on behalf and for the benefit of the said body corporate*, that, &c., (setting forth substantially the agreement as alleged in the declaration, and then proceeding as follows :) which said agreement was then and there entered into by and between the said plaintiff and the said defendant, *so being president as aforesaid, and for the benefit of the said Washington Banking Company*, the better to enable them to carry on their operations and business of discounting and issuing bank notes as aforesaid, at their said office in *Wall-street*, against the form and effect, true intent and meaning of the sta-



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tute in such case made and provided ; that the defendant, in pursuance of the *said unlawful agreement*, was in the habit of sending notes of the company to the office in Wall-street, *to be there discounted by them as aforesaid*, and the same when so sent were *discounted for him* in the manner above stated, against the form, &c. of the statute : *by means whereof, the Washington Banking Company were the better enabled to carry on their said operations and business of discounting and issuing notes as aforesaid at their office in Wall-street*, against the form, &c. of the statute—of all which the plaintiff had notice ; and that the notes of the Washington Banking Company, mentioned in the declaration, were left under the said agreement at the office in Wall-street kept by the company ; and this, &c. wherefore, &c. There were two other pleas similar to the above.

The defendant also pleaded that the notes of the *Washington Banking Company* in the declaration mentioned, left at the office of the company in Wall-street, *were received by the plaintiff in payment and in the course of his business as a broker in the city of New-York* ; that a large portion of them were *under the denomination of five dollars* ; that such notes were issued by the said company, *not being authorized to issue the same by any of the laws and statutes of the state of New-York*: by means whereof, the agreement between the parties is void ; and this, &c. wherefore, &c. There were three other pleas similar to the last. The plaintiff *demurred* to all the special pleas, and the demurrers were sustained by the court.

The cause went to trial on the general issue ; and after the evidence was closed, the presiding judge, in his charge to the jury, commenting upon the testimony, very decidedly expressed his opinion, that the defendant contracted with the plaintiff in his *individual capacity*, and not as the agent of the *Washington Banking Company* ; closing his remarks, however, with the observation, that “ if the jury viewed the testimony of *Homan* (a witness in the cause) in the light he had stated, the plaintiff was entitled to their verdict.” The jury found for the plaintiff. Judgment having been entered for the plaintiff, a writ of error

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was sued out by the defendant removing the record into the supreme court, where the judgment was *affirmed*. See the opinion delivered in that court, 17 *Wendell*, 172, *et seq.* The defendant then removed the record into this court, where the cause was argued by

*F. B. Cutting & G. Wood*, for the plaintiff in error.

*B. F. Butler*, for the defendant in error.

After advisement, the following opinions were delivered.

By the CHANCELLOR. The first question which presents itself for our consideration in this case, is the validity of the defence set up in what has been denominated the first class of special pleas, or the second, third and fourth pleas to the plaintiff's declaration. These pleas profess to be founded upon a well settled principle of law, that no court of justice will lend its aid to enforce the performance of any contract or agreement which is contrary to public policy or good morals, or in contravention of the laws of the state; and the question is, whether the contract between the parties in this case, as the same is stated in these special pleas, comes within that principle. The question is not whether such a defence is conscientious as between the parties, where perhaps the defendant has been himself more culpable than the plaintiff who is endeavoring to enforce the contract against him; for, in the language of Lord Mansfield, it is not for the sake of the defendant that the objection is ever allowed in such cases, but it is upon general principles of policy that courts will not lend their aid to any one who founds his claim or cause of action upon either an immoral or an illegal act. Thus in the case of *Girardy v. Richardson*, 1 *Esp. R.* 13, the plaintiff, who rented his house to the defendant for the purpose of the better enabling the latter to carry on an illegal and immoral business there, was certainly far less culpable than the defendant, both legally and morally; and yet, upon this principle of public policy, he was not permitted to recover for the rent.

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The substance of the pleas under consideration is; that the Washington Banking Company of New-Jersey, a foreign corporation, in defiance of the prohibition of the statute and in violation of our laws, kept an office in Wall-street, in the city of New-York, for the purpose of discounting notes, checks and bills, *and of issuing bank notes of that bank to be put in circulation as money in this state*; that De Groot, the defendant, being the president of that bank, made the agreement declared on in this case, with the plaintiff, who was a broker in New-York, to receive or purchase the bills of the bank, and that such bills should be redeemed from the plaintiff, semi-weekly, at the trifling discount of one-eighth of one per cent; and that such agreement was entered into for the benefit of such foreign corporation, the better to enable it to carry on its said operations and business of discounting, and of issuing bank notes at its office in New-York, contrary to the statute. These pleas contain also another averment, which I consider, however, as not very material in the decision of this case, that in pursuance of the agreement the bills and notes of this foreign corporation, which were subsequently received by the plaintiff, were sent by him from time to time to such office in Wall-street, and were there discounted by the corporation, contrary to the provisions of the statute, whereby the corporation was the better enabled to carry on its illegal operations and business of discounting and issuing bills and notes at such office. It will be recollected that the question here is not whether the bills for which this suit is brought were received under such circumstances that the bank itself would not be liable for their redemption, so as to render it material to ascertain whether these particular bills had been illegally issued at the Wall-street office in New-York, or at the mother bank at Hackensack; but the plaintiff is seeking to recover of a third person, who is not liable for the payment of the bills issued at either place, except so far as he is bound by this special agreement, which, as appears by the pleas, was entered into for the purpose of better enabling the corporation to carry on the illegal business of discounting notes, and issuing bills at the office in Wall-street, in violation of our

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laws. As the aid to be given to the illegal business carried on in Wall-street, was unquestionably by giving a certain degree of credit and currency to the bills of the institution which were to be issued at that office, this could be done as effectually by redeeming the bills of the bank generally, as by redeeming those only which had been illegally issued. If the special agreement, therefore, would be void as to any bills issued at the office in Wall-street, it was equally so as to bills issued at the mother bank, and received under the same agreement; which in its terms extended to all bills of the bank, wherever issued.

These pleas then present the question, whether a plaintiff who agrees to do something for the purpose of aiding another to do an illegal act, or in the language of these pleas, for the purpose of the better enabling him to do that act, can sustain an action on that agreement to recover the compensation which the other party has agreed to make as an equivalent therefor. If the plaintiff is right in supposing the defendant meant to contract for himself absolutely, and not as the mere agent of the bank, the personal responsibility of the defendant is a part of the equivalent which the plaintiff was to receive for the aid furnished the bank in its illegal operations in Wall-street, by thus giving currency to its bills. The court below say it is not shown how the redeeming of the bills under this agreement could aid the illegal operations at the office in Wall-street; but as the plaintiff, by his demurrer, has deprived the defendant of the power of showing how it could aid those operations, this allegation in the plea must be taken as true, unless the court see that it is impossible that it could have had that effect; and then I admit the allegation must be rejected as idle and false. I think, however, any one who is much acquainted with the operations of Wall-street will readily comprehend how the redemption of bills there, at a trifling discount, will aid those who are putting such bills in circulation as money, at an office in the city, in lending them the more readily to those who wish to borrow in the ordinary course of banking business. I believe most banks have found, that a much better circulation is given to their bills

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if they are kept but a little below par in the city of New-York, than if they suffer them to be at a larger discount there. The employment of brokers, therefore, to buy up the bills at a trifling discount, will the better enable the bank to lend its bills and keep them in circulation, whether they are lent at the mother bank or at an unauthorized discount office in Wall-street. The presenting of the bills for payment at the office in Wall-street at stated periods, would also materially aid the bank in keeping up the operations of that office, as it would save the necessity of keeping any very large amount of funds at the mother bank, and would enable the agent at the office in Wall-street, in a case of emergency, to raise the wind upon the discounted paper in his possession, on a very short notice, if an unexpected amount of the bills of the institution was sent in for redemption. I do not think, therefore, we are justified in saying that this averment in these pleas is one which it was impossible should be true; and if it was not, the defendant should not have been deprived of the power of proving it, by the allowance of the demurrers to the three first special pleas.

There are undoubtedly many conflicting decisions upon the question how far the vendor of an article is chargeable with a participation in the illegal purpose for which it is intended to be used, from a mere knowledge of the fact that the purchaser intends so to use it. The case of the druggist who sold drugs to a brewer, knowing that he intended to use them in his brewing, contrary to statute, is a very strong case in favor of extending the principle to a collateral contract, which had no necessary connection with the violation of the law. That case shows, too, that where the agreement is made for the purpose of aiding in a violation of the law, it is not necessary to aver and prove that the offence was in fact consummated by an actual violation subsequent to the agreement; which agreement is void from the beginning. *Langdon v. Hughes*, 1 *Maule & Sel.* 593. If a trader agrees to furnish a robber with arms and ammunition, for the purpose of carrying on his business of a highwayman, it cannot be a valid answer to the illegality of the contract, that the

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arms and ammunition sold to him for that purpose, were not in fact used in the prosecution of the illegal object originally intended at the time of the purchase. The illegality of the contract consists in the intention to aid in a violation of the law, or of a principle of public policy, or to commit a breach of good morals, and not in the actual consummation of the offence. Those cases in which an independent contract has been held void from a mere knowledge of the fact of the illegal end in view, proceed upon the ground that the party having such knowledge intended to aid the illegal object at the time he made the contract; and wherever, therefore, that intention is shown, no doubt can exist as to the propriety of applying the rule that no action or claim can be sustained, in a court of justice, founded upon such contract. Here it is distinctly averred, and the fact is admitted by the demurrer, that the object of the agreement between De Groot and Van Duzer was the better to enable the bank to carry on its illegal business at its office in Wall-street; and if so, an action cannot be sustained by either party on that contract, unless this court is disposed to depart from a most salutary rule of law. Neither do I think this case comes within that class of cases in which the contract, whereon the plaintiff sought to recover, had no immediate connection with the illegal act; for, as I have before observed, a part at least of the consideration for the defendant's promise was the aid the plaintiff was to furnish the corporation in its illegal operations, by giving currency to its bills in the city of New-York; by which, in the language of the pleas, it was the better enabled to carry on that business.

Whether it was wise or unwise in the legislature to endeavor to secure to the citizens of this state a safe paper currency of known value, by prohibiting the issuing of any bills or of carrying on any banking operations here except such as are authorized by our own laws, is a question with which, as a court, we have nothing to do. But it is the duty of courts to endeavor to carry into effect the declared will of the legislature, by adhering to those salutary principles which the wisdom of ages has found necessary and proper to compel a due observance of the laws;

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and by which principles it is made the interest as well as the duty of every individual to abstain from any attempt to defeat the operation of the laws, either directly or indirectly. For these reasons, I think the three first special pleas in this case were well pleaded, and that the demurrer should have been overruled; or in other words, that judgment should have been given thereon for the defendant.

There is a defect in the second class of pleas, in not averring that the agreement to redeem the bills of the bank which should be taken by the plaintiff from time to time, *included bills of a denomination less than five dollars*, as well as the larger bills. As it stands, it does not appear that at the time of making the agreement the bank had ever issued any bills under five dollars. For aught that appears in those pleas, the small bills which were contained in the package had been issued subsequently to the agreement, and were placed in the package contrary to the intention of the parties at the time of the agreement. If so, that would of itself only defeat the recovery *pro tanto*. But if it was a part of the original agreement to redeem bills of a denomination less than five dollars, as well as the larger ones, then the whole agreement was void for that reason. I think the demurrers to the four last pleas were well taken.

I am inclined to think the charge of the judge upon the trial was erroneous, in taking from the jury the question *whether the defendant was authorized by the bank* to make the arrangement with the plaintiff, in the character of president of the bank; and if so the judge necessarily took from the jury the question whether the contract was in fact made by the defendant in his individual capacity, or only in the character of the president of the bank; for if he was not authorized to contract as agent, it was his individual contract, although in terms made as agent. I think there was sufficient evidence to have authorized the jury to find that he was empowered by the directors originally to make these arrangements to redeem the bills of the bank in New-York, or that they had subsequently sanctioned the same.

Again; the legislature having in express terms prohibited the officers of our own banks from buying up, at a discount, the bills

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of their own institutions, I am inclined to think public policy requires that the same principle should be extended to foreign banking companies; and that no action should be permitted to be sustained upon an agreement which is directly repugnant to the settled policy of the state. For these several reasons, but particularly for the first, I feel myself bound to vote for a reversal of the judgment of the court below.

By Senator EDWARDS. The demurrers to the several special pleas are *general* and not special, and consequently every material fact averred in them, is admitted. If, therefore, the facts set forth in any of the pleas demurred to are sufficient to bar the plaintiff's recovery, the demurrer should have been overruled, and the judgment of the supreme court, as to the pleadings of the parties, should be reversed.

The special pleas in this cause, for the sake of brevity, have been arranged by the supreme court in giving their opinion, and by the counsel on the argument, into two classes, and each plea of the first class has been viewed as substantially alike, and involving the same principles, and also each plea of the second class, and the decision of one in each class, a decision of the whole; and I propose to consider them in the same order.

It is alleged in the first class of pleas, that the agreement on which the plaintiff in this action seeks to recover, was made in violation of the following statute, viz: "No person, association of persons or body corporate, except such bodies corporate as are expressly authorized by law, shall keep any office for the purpose of receiving deposits, or discounting notes or bills, or issuing any evidences of debt to be loaned or put in circulation as money; nor shall they issue any bill, or promissory notes, or other evidences of debt as private bankers, for the purpose of loaning them or putting them in circulation as money, unless thereto specially authorized by law." 1 R. S. 708, § 6. The first plea of the first class sets forth, that the company kept an office in Wall-street, in the city of New-York, in which John E. Solomons acted for them and on their behalf as their agent, for



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the purpose of discounting notes, checks, bills, and issuing promissory notes, commonly called bank notes of the Washington Banking Company, and other promissory notes and evidences of debt to be put in circulation as money, &c. This part of the plea sets out a case substantially within the provisions of the act, and the keeping of such an office in my view is virtually a violation of the statute ; but so far as this part of the plea is concerned, it does not allege that the keeping of this office was a part of the agreement under which the defendant was to receive the bills of the plaintiff. Is this defect cured by the subsequent averments of the plea ? If the averments show an agreement which was entered into for the purpose of aiding and assisting the company in the prosecution of the unlawful design for which the office was kept, the defect is remedied ; for an agreement designed to aid and assist to carry into effect an unlawful act is as invalid as that which is made to effect the very object, and therefore cannot be enforced by law ; for the rule "*ex turpi contractu non oritur actio*" is well settled. *Langton v. Hughes*, 1 Maule & Selw. 593. *Briggs v. Lawrence*, 2 T. R. 454. *Pennington v. Townsend*, 7 Wendell, 281. *The Bank of the United States v. Owen*, 2 Peters, 527. *Thalhimer v. Brinkerhoof*, 20 Johns. R. 397. The question then is, does the plea substantially aver that the plaintiff entered into an agreement for the purpose of aiding in the unlawful business for which the office was kept ? It avers that it was agreed by and between the plaintiff and the defendant, so being president as aforesaid, *on behalf* and *for the benefit of the company*, that the defendant being such president, should and would, at the said office in Wall-street, receive from and discount for the said plaintiff all such notes of the Washington Banking Company, as the plaintiff, as such broker as aforesaid, shall from time to time receive at his office, &c. It is averred, therefore, that the defendant, being president, acting on behalf and for the benefit of the company, was to receive from and discount all the bank notes of the Washington Banking Company, which the plaintiff, as such broker as aforesaid, should from time to time

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receive at his office in the city of New-York, &c. As what broker ? as one acting for the company and on their behalf as their agent. At what office ? at the office kept for the purpose. For what purpose did he as their broker and agent procure and receive such bills ? For the purpose of enabling such company to discount notes, checks, bills, and issuing promissory notes, commonly called bank notes of the Washington Banking Company, and other promissory notes and evidences of debt to be put in circulation as money. The plea then goes on to allege that the agreement was made *for the benefit* of the said Washington Banking Company, *the better to enable them to carry on their operations* and business of discounting and issuing bank notes as aforesaid, at their said office in Wall-street. The inference therefore is irresistible, that the plea alleges that the agreement was made for the benefit of the company, the better to enable them to do an illegal act, and if so made, the court could not properly aid the plaintiff in seeking his remedy for a violation of it ; if it was not so made, then the agreement was valid. But the plaintiff, by his general demurrer, admits it was made, the better to enable the company to do an unlawful act, as I conceive it. The test of the validity of the agreement must rest upon the fact, whether it was to effect such an object or not ; this, in my view, was a proper subject for the jury, and the plaintiff, instead of demurring and thereby admitting it, should have taken issue upon it. I am therefore for overruling the demurrer to this class of pleas.

As to the second class : I am of opinion that these pleas are radically defective. They contain no averment that the *agreement* was that the defendant should receive bills under the denomination of five dollars. The averment is, that a large portion of the notes were under the denomination of five dollars ; but there is no averment that such bills were included in the agreement as forming a part of it, or that the defendant was by the terms of the agreement under any obligation to take them. The agreement as there set out is, that the defendant was to receive and discount all such notes of the Washington Banking Company as should be procured by the plaintiff, which must be taken

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to mean such notes as he might legally procure in the course of business under the then existing laws of the state, and not such as the law prohibited the circulation of. The contract should not by implication receive an illegal construction. When a contract is capable of receiving two constructions, the one legal and the other illegal, it should receive that construction which would hold it legal. I am of the opinion, therefore, the demurrers as to this class of pleas were well taken, and should be sustained.

The only remaining question appears to be, whether the motion for a new trial for the misdirection of the judge should have been denied. The judge charged the jury that the defendant showed no authority whatever to make the contract on the part of the bank; that as president merely, he had no such right, and it did not appear that there was any resolution of the bank, or any act of the directors, to authorize it; that the defendant having thus contracted in terms, which purported to bind him personally; and showing no authority from the bank (whose agent he now claimed to be) to bind it, he must be considered as contracting with the plaintiff in his own behalf, &c. The judge seemed to labor under the impression that the defendant must have shown a resolution of the board, or some act of the directors, to give him authority to make the contract in question, and that in the absence of such proof, he must be considered as contracting in his own behalf. This, I apprehend, was a misconception on the part of the judge, and under the circumstances of the case, was well calculated to mislead the jury. It was not necessary that a special authority should have been shewn from the company. Corporations, like individuals, are responsible in the manner in which they permit their agents to hold themselves out to the public. *Buckley v. The Derby Fishing Company*, 2 Conn. R. 252. *Angel on Corp.* 158. If circumstances were shewn, sufficient to raise a reasonable presumption that he was contracting as the president of the bank, and in that behalf as its official agent, it was a proper question for the jury. It was proved by *Solomons*, that Van Duzer knew he was the

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agent of the bank, and that he knew the president. That Van Duzer wished to know if he was willing to allow him one per cent to give the bills a circulation, and being answered in the negative, he requested him to speak to the president of the bank, and see if he would not allow it. That Van Duzer's money came to the office addressed to George W. Yule, cashier of the Washington Banking Company, Hackensack, New-Jersey; and he produced more than twenty envelopes that came to him from Van Duzer, with bills enclosed, which went to his account with the bank. *Homan* also concurs with *Solomons* as to the manner in which the packages were addressed. That they were addressed to the cashier of the bank as well after as before they were redeemed at *Solomons*. All the difference as to the manner of redemption, after the agreement was made with De Groot, seems to be, that they were redeemed at Solomon's office, who was the agent of the bank, and before the agreement Van Duzer either sent or carried them to the bank. Both of these witnesses testify to a variety of circumstances sufficient to raise a rational presumption that De Groot was transacting the business as the agent of the bank, and with their knowledge and approbation, and should therefore have been submitted to the jury, in such manner as to leave the jury freely to exercise their own judgment upon them. Not that the court may not give its opinion as to matters of fact; it has an undoubted right to do so, for the consideration of the jury, but as the jurors are the triors of the facts, such an expression of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. *Tracy v. Swartout*, 10 *Peters' R.* 96. This in my judgment, was not done in the case under consideration, but the court assumed the right of drawing inferences from the facts, and instructing the jury as to those facts. The jurors being the legally constituted judges of the facts proved, no instructions of the court should infringe upon their high prerogative.

The next objection urged for our consideration is, that the exception to the judge's charge was too general. This objection, however, in my judgment, is untenable. The exception appears

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to be sufficiently explicit, for the attention of the judge was particularly called to the main and essential point. The defendant's counsel alleged that it was a contract with the defendant as president of the bank, and in behalf of the bank as its agent; and the judge then in substance charged the jury that the defendant must shew his authority, by saying that it did not appear that there was any resolution of the bank, or any act of the directors, to authorize it; that the defendant having thus contracted in terms, which purported to bind him personally, and having no authority from the bank to bind it, he must be considered as contracting with the plaintiff in his own behalf; leaving the jury plainly to infer that it was necessary there should be a resolution of the bank, or some act of the directors, to authorize him to make the contract as agent, so as to bind the bank; whereas neither was necessary. If, as president, he assumed to act as agent, and these acts were brought home to the knowledge of the directors in the transactions of the business of the bank, and they permitted him to hold himself out to the public as their acting agent, in the management of their affairs, the bank, as it respects third persons, must be held responsible. It is unnecessary to shew a direct authority in such cases. That he was the president of the bank, acting as the general agent of the corporation, negotiating as to their paper, and did not assume or undertake to contract in his individual capacity, together with the other facts and circumstances, proved, was enough to entitle the defendant to the full benefit of the verdict of the jury, to find whether such contract should be considered as a private transaction or not. I am of the opinion a new trial should have been granted, and I am for reversing the judgment on both grounds, with leave to the plaintiff to withdraw his demurrer to the first class of pleas, and amend on payment of costs; but am for sustaining the demurrer to the second class of pleas with costs.

By Senator VERPLANCE. The main question in this case is, as to the correct interpretation and right application of the legal principle expressed in the old law maxim, *ex turpi contractu non oritur actio*; that a contract resting on an illegal or immoral

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consideration, is void. The principle itself is undoubted, and is acknowledged in one form or other, throughout the jurisprudence of the whole civilized world. Yet there is a degree of uncertainty as to its extent and application, and that in relation to cases of very frequent occurrence in the ordinary business of life. On some points there is an apparent contrariety in the decided cases; and a great deal of doubt, and even contradiction in the elementary books, as well as in the reasoning of learned judges. I have myself, in making up my decision on this case, hesitated a good deal; not indeed as to the equity of the case, but as to the exact rule which should govern as to all transactions of a similar nature. I have therefore thought it proper, in expressing my concurrence with the decision of the supreme court, to state, as briefly as I can, my own views of this doctrine and its limitations, as well as its peculiar application to the case under judgment.

The original grounds and reasons of this doctrine have been clearly stated by Lord Mansfield, in one of the earlier cases on this point; and whenever principles have been stated in full, by that illustrious magistrate, and elucidated by his reasoning, we have in our hands a clue to guide us, *cæca regens vestigia filo*, through any labyrinth of conflicting authorities or inconsistent adjudications. "The objection," says he, "that a contract is illegal, or immoral, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for *his* sake, however, that this objection is ever allowed; but it is founded on general principles of policy, which the defendant has advantage of, contrary to the real justice between him and the plaintiff, if I may so say. The principle of public policy is this—*ex dolo malo non oritur actio*. No court will lend its aid to a *man who founds his cause of action upon an illegal or immoral act*. If from the plaintiff's own showing, or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of the positive laws of his country, then, the courts say that he has no right to be assisted. It is upon that ground the court goes—not for the sake of the

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defendant, but because they will not lend aid to such a plaintiff. So if the parties change sides, and the defendant brings his action against the plaintiff, the latter would have the advantage. Where both are equally in fault, *potior conditio defendentis*." "The question then is, whether the demand be upon the ground of any immoral act or conduct, or upon the ground of his being guilty of any thing prohibited by law." *Holman v. Johnson, Cooper*, 341. Here, it will be seen, the doctrine is made to rest upon the ground of public policy. The contract is made void, because it is founded on an immoral act. And in applying the rule to the person making the demand, the inquiry is whether he has been *guilty* of any thing infringing moral law, or prohibited by positive legislation.

In carrying out and applying these rules, two questions arise—both of them springing out of the broad words of the legal maxim. First, it was doubted how far a court should go, in enforcing subsequent contracts growing out of a past illegal act or agreement, but not immediately forming any essential part of such act or contract: as when the new contract is either between the original guilty parties, or else known to both sides to be indirectly connected with an illegal transaction. The courts sometimes manifested a disposition to set aside all such contracts, and to consider them tainted by the original vice of the prior transaction. But it is now well settled otherwise in the courts of this country, and I doubt not also in England, notwithstanding some varying cases. The English cases are collected and reviewed by Chief Justice Marshall, in *Tolen v. Armstrong*, 11 *Wheaton*, 258, and I need not go over them. There the supreme court affirmed the doctrine laid down by Judge Washington, in the circuit court, "that if the new promise be unconnected with the illegal act, and founded on a new consideration, it is *not* tainted, although such illegal act was known to the party to whom the promise was made, and he was the original contriver of it." In deciding that this knowledge of a foregone illegal contract did not vitiate a second contract caused by that transaction, but founded immediately on a new consideration, Chief Justice *Marshall* is much

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influenced by the consideration of the opposing public policy, which was the source of the original doctrine. "To connect," says he, "distinct and independent transactions with each other, and infuse into one, perfectly fair and legal in itself, the contaminating matter which infected another, would introduce extreme mischief into the ordinary affairs and transactions of life, not compensated by any accompanying advantage." 1 *Wheat.* 261. In spite, then, of some varying cases and dicta we may consider the law as to such subsequent contracts as being well settled in the manner in which it has been stated by Judge Story, *Conflict of Laws*, 207, that the principle of invalidating contracts, for the illegality or immorality of the consideration, is not to be "extended to new transactions, after the illegal act, though accompanied with knowledge thereof." "Thus, after goods are smuggled, if a new contract is made by the smuggling importer for a sale to the retailer, and by him to a tailor, and again by him to a customer, all these contracts are good, though accompanied by the previous violation of law." The present case, though depending on the same principle, does not fall within this class, but belongs to the second one of the same general nature to which I have above alluded—I mean those where the question is, how far does the plaintiff's knowledge of an illegal object, use or intent of the contract by the other party, but in which he has no direct part, vitiate his right of action? As, for instance, where a person agrees to sell goods to another whom he has good reason to believe means to violate the revenue laws, or otherwise use the goods illegally. The analogy between these and the previous class of cases is so strong that I could not consider the latter alone; and the reasons and decisions on the one head, have a direct and powerful bearing upon the other.

Guided, then, by this analogy, and looking, first, to the reason of the doctrine, (laying aside, for a moment, all the positive authorities,) we cannot, it seems to me, but arrive at some such conclusions as these: As the refusal to give legal validity to a contract involving an immoral consideration, has in view the pro-



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motion of the great objects of public policy in preventing violations of law, so, for the same reasons, it ought never to be carried to such an extent, as (in Chief Justice Marshall's language, just cited,) "to introduce extensive mischief in the ordinary affairs and transactions of life, not compensated by any accompanying advantage." Society is formed for the common advantage of all who compose it; and in the mixed and imperfect nature of man, the immoral and the profligate, as well as the weak and ignorant transgressors, have still their rights, and must not be shut out from the benefits and protection of the laws. The law itself, if wise, must, like the all-wise Father of all law and all wisdom, shed its blessings "on the evil and the good—the just and the unjust." It would surely be to carry this doctrine to a "most inconvenient and dangerous extent, if it were held a crime," as Lord Mansfield said in *Holman v. Johnson*, to sell goods in the usual course of trade, with the probable knowledge that some of them may minister to the vices of a licentious person, or be so used as to cause a transgression of some law of the revenue, or even of some ordinance of local police. Virtue and vice are too much mixed up in life to allow of so impracticable a legal morality; which, after all, would serve much oftener to protect and assist fraud, than to preserve the authority of the laws. Thus, it would seem, that public policy could not go further in this direction, without defeating its own ends, than to refuse to enforce contracts which went directly and immediately to the violation of the laws of the land or of public morals. It would defeat its own ends, if it made void all contracts remotely, indirectly, consequentially or contingently tending to any such violation—just as it would do so, if it invalidated contracts growing subsequently and secondarily from an illegal transaction, but on a new and meritorious consideration—which, as we have seen, our courts hold to be valid.

Again: the application of the doctrine to particular individuals is guided, as it is well laid down in *Holman v. Johnson*, *Cowper*, 342, above cited, by the participation in the *guilt* of the transaction. It rests upon "the cause of action arising *ex turpi causa*, or the party's transgression of his country's laws." He who sells

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any thing, or bargains to do any act, directly and immediately, in furtherance of an illegal intent, and as its essential and necessary means, it being known to him that such intent is the cause and reason of the bargain, may fairly be concluded as a participator in the guilt. In case of such an immediate knowledge and direct intent to further an illegal object, by providing the means essential to its attainment, he who furnishes such means, as Lord Ellenborough says, in *Langton v. Hughes*, 1 *Moule & Selw.* 593, "may be said, *quantum in illo*, to have caused or procured the illegal act." But we cannot, without a latitude repugnant to every principle of construction of penal law, and even to our own moral sense, extend this notice of guilt to one who knows that in the exercise of a trade, useful and lawful, he supplies that which can be misapplied to vicious ends, or used in a manner forbidden by the policy of the law. To give, therefore, this character of construction, or accessory guilt to a party, it would seem necessary that the act violating the law should be in his direct intention, and not merely known to be a possible or even probable consequence of his contract.

From these considerations, and arguing only upon general principles, I would infer these few rules :

First, that to invalidate a contract, upon the ground of a plaintiff's knowledge that his part of it would aid an immoral or illegal act, the means furnished by him must be such as are directly necessary and essential to such a purpose, and be supplied with the express intent to accomplish that object.

The second rule, the converse of the other, is, that the bare knowledge that the person pursues an illegal trade, or criminal course of life, ought not to vitiate a contract made with him in the ordinary course of business, and not directly and immediately connected with such criminality, although the effect of the contract might be to facilitate such an object.

The conclusions to which I have thus been brought by general reasoning, are confirmed by the best and most numerous authorities, and will at the same time explain and reconcile some of them that must at first strike the reader as contradictory, and

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have been so represented in the elementary books. Thus in, *Lightfoot v. Tenant*, 1 Bos. & Pul. 551, in *Briggs v. Lawrence*, 3, T. R. 454, *Wagul v. Reed*, 5 T. R. 591, the courts held that the contract for the sale of goods was void, where it entered directly into it that the same should be smuggled or exported contrary to law, as where they were to be put up in a particular manner, fit only for that purpose, or delivered at a particular place, out of the course of fair trade, so as to leave no doubt of the intention. Again : where drugs are sold by a druggist to a brewer, for the express and sole purpose of being mixed with the liquor, in a manner forbidden by statute, in consideration of the public health though the druggist had no further part in violating the law than selling the drugs for that known purpose, it was held that he sold them "in order to enable the vendee to use them for illegal purposes, and could not recover the price." 1 *Maule & Selw.* 593.

But on the other hand, where articles of dress were sold, as in *Bonny v. Bennet*, 1 *Campb.* 348, or where lodgings were let, as in *Cripp v. Churchill*, cited in 1 Bos. & Pul. 340, or washing, &c. done for prostitutes, as in *Lloyd v. Johnson*, *id.* 341, it was held that the sale of the articles of dress, the lease of lodgings, the washing, &c. were general contracts, and "would not be vitiated by knowledge of the probable use to which the articles might be applied;" *aliter*, when the party expected to be paid from the profits of prostitution. So, again, in *Hodson v. Temple*, 1 *Taunt.* 182, where spirits were sold with the knowledge that the buyer was engaged in the double business of distilling and retailing liquors, which two lines of business were forbidden, (probably on account of the policy of the excise laws,) under a penalty to be carried on by the same person, the contract was enforced. Sir James Mansfield, Ch. J. of the C. B. said, to invalidate it, "would be to carry the law much farther than it had yet been done. The mere selling of goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment. To effect that, it is necessary that the vendor should have a share in the illegal transaction." In that case, the carrying on two trades together,

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either of which was innocent, was the violation of the law, and with this the original seller of the liquor had nothing to do; it had no bearing upon, nor was the inducement to his contract.

To apply these views and rules to the case now under judgment: By a law of this state, it is illegal for a foreign corporation to discount paper and issue notes, or keep an office therefor, within this state. But the business of redeeming and purchasing the paper of foreign banks coming here in the course of trade, is one of great commercial convenience, not prohibited to any private citizen, and expressly allowed by statute to some of our chartered companies. Van Duzer, the plaintiff in the court below, is a broker, engaged in that trade, and had, before the contract, bought or redeemed notes issued by the Washington Banking Company, chartered in New-Jersey, and carrying on business there. The defendant below, De Groot, who is president of that bank, agrees with him to redeem and pay for in New-York, all such notes of that bank as Van Duzer should redeem at certain rates; on which consideration he undertakes to redeem them. De Groot now pleads that the agreement was for the benefit of the Washington Banking Company, "the better to enable them to issue their paper, and discount notes in the city of New-York," where they illegally kept an office, and actually did so issue notes, of all which Van Duzer had notice. It is not averred that Van Duzer made himself a party to the illegal transaction by drawing his profits or compensation from it, or their being contingent upon it; nor that he furnished any direct and immediate means of such illegal banking; as for instance, by deviating from the ordinary course of his business, to give special currency to the notes illegally issued; or that the illegal business depended directly upon the notes so issued being redeemed in the city of New-York. On the contrary, the plea admits that the defendant agreed to receive from Van Duzer *all* the notes of the company which he might redeem, however issued; that is, whether in New-Jersey, where they might be legally issued, or in this state. The agreement then, in my judgment, is legal, and cannot be vitiated by the general knowledge that it would, consequentially, "the better enable a third

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party to carry on" a business forbidden by law, in which the plaintiff below had no direct concern. His intention was, to give general currency to the paper of the bank, but not specially to aid the infraction of our laws in relation to those of them issued here. The case coincides, therefore, in principle, with *Holman v. Johnson*, with *Hudson v. Temple*, and *Lloyd v. Johnson*, above cited; but it is still stronger than they are, as the contract is not with the very party actually engaged in the illegal transaction, and is for a new and distinct consideration, and so far governed by the analogy, at least, of the rule in *Tolen v. Armstrong*, 11 *Wheat.* 256, above cited, "that a promise, unconnected with the illegal act, and founded on a new consideration, is not vitiated by the knowledge of such illegality." These pleas were, therefore, in my judgment, properly overruled by the superior court.

I agree, moreover, with the two courts below, as to the effect of the foreign bills *under five dollars*, illegal by our restraining act, which were left for redemption by Van Duzer with the others. This fact forms no bar to his action, but goes simply to the amount of the recovery at the trial, reducing it by the value of these notes. Judge *Bronson* has put this chiefly on the ground that it is not alleged that the *agreement* extended to these small bills, but merely that a part of the bills, for which payment was demanded, were of that denomination. This is correct, and we have no right to presume an illegal agreement, or to make it out by mere inference. But I rest my own opinion on a broader ground, because even if the illegal redemption of these small bills did enter into the contemplation of the parties, as a part of the contract, and had been so alleged and admitted, the legal result would not have been varied. The agreement is void, so far by the operation of our restraining act, and the amount of the recovery so far diminished; but the rest of the agreement would stand. "When the transaction is of such a nature that the good part of the consideration can be separated from what is bad, the courts will make the distinction; for the common law doth decide according to common reason; and having made that

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void which is against law, lets the rest stand." 2 *Kent's Comm.* 467, and cases there cited. I have read the cases referred to by Chancellor Kent, and rest my opinion upon the reasons assigned in them by Chief Justices Kenyon and Ellenborough, not less than on the authority of the decisions themselves. The only exception to the rule is, where the good and the void consideration are so mixed, and the contract so entire, that there can be no apportionment; which is clearly not the case here. Otherwise, the principle is, that when any matter void by statute is mixed with good matter, entirely independent of it, the good part shall stand, and the rest be void. This rule holds even when the prohibited consideration forms a direct and positive part of the contract. *A fortiori*, it should apply here, when the illegal redemption of a part of the notes issued by the bank (such as might be less than five dollars) was only an accidental and contingent part of the bargain, which might have been literally executed without redeeming a dollar of that sort of paper.

Some other points are brought under our review on the exceptions taken to the charge of Judge Oakley on the trial. I can see no grounds for granting a new trial on these exceptions. The judge's charge appears to be sustained by the evidence as it is before us on paper. Even did it not appear so, I cannot consider it good ground for disturbing a verdict, that the judge erred in the view he took of any fact in evidence, or on the degree of weight he gave to any part of the testimony, provided the whole was submitted to the judgment of the jury, unaccompanied by any misdirection as to the law. The opinion of Chancellor Kent, in the *New-York Firemen's Ins. Co. v. Walden*, 12 *Johns. R.* 513, which was sustained by a majority of the court for the correction of errors, settles the general law, and vindicates and marks out the rights of juries. The line between a direction of a judge bearing on the law, and furnishing the ground for setting aside a verdict under it, and an opinion on the facts for the guidance of the jury, must sometimes be shadowy and indistinct; but that of Judge Oakley, especially as to the testimony of *Homan*, I think falls clearly within Chancellor Kent's definition in the

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case referred to. It is delivered as "a mere opinion, and not as a direction; and the jury were to decide the fact upon their own view of the case;" for judge O. stated his view of the testimony, and then added—"If the jury viewed the testimony in the light he had stated, the plaintiff was entitled to their verdict." To set aside a verdict, on such grounds, seems in hostility to the nature and character of the trial by jury. Its effect would be, in a good degree, to substitute a court of review, to whom the evidence comes in a meagre and condensed form, in place of the court and jury, who have the living witnesses before them. The tendency of such an interference, if frequent, would be to cut off from the jury the advantage they may derive from the experience of the judge, whilst at the same time it would abridge their just rights, and habituate them and the bar to look elsewhere than to the honest exercise of their independent judgment, for a correction of any mistake of the judge on the facts submitted to their decision.

The only part of judge Oakley's charge that seems at all open to argument as a misdirection as to the law, is that in which he expressed his view of the authority of the defendant to make a contract as an agent for the bank. The defendant's counsel alleged that this was a contract with the defendant as president of the bank, in its behalf, as its agent. The judge charged that it was necessary that the defendant should establish this to the satisfaction of the jury; that the defendant showed no authority whatever to make this contract on behalf of the bank; that as president, merely, he had no such right; and that it did not appear that *there was any resolution of the bank, or any act of the directors, to authorize it*; that the defendant having thus contracted, in terms which purported to bind him personally, and showing no authority from the bank to bind it, must be considered as contracting with the plaintiff on his own behalf." It was insisted in argument, that a corporation was not now held to such strict rules as formerly, and that it did not require a formal act or resolution to make a contract, or to enable an agent to bind them. This is true. Still I see no legal error in the judge's

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language. He states the law as it actually is, although in the briefest and most general terms. There must have been either a formal *resolution*, or some other *act* formal or informal of the directors, by which they gave either a direct agency to the president, or an implied assent, holding him forth as their agent, which the mere naked fact of his being president could not make him.

If it should yet be thought that the judge's words do not convey this view, and left the jury in the dark as to some mode in which the bank could bind itself, I must yet hold, that such an omission would not authorize a new trial, unless the judge's attention was at the time called to the point as material. The reasoning of Chief Justice Marshall, in the latter part of the case of *Tolen v. Armstrong*, on which I have so much relied on other points in this case, is conclusive in my mind on this head, even without the aid of the numerous authorities in the courts of this state, sustaining the same doctrine, as cited by the learned counsel for the defendant in error, in the argument before this court.

On the question being put, *Shall this judgment be reversed?* the members of the court divided as follows :

*In the affirmative*; The CHANCELLOR, and Senators BECKWITH, DOWNING, EDWARDS, HULL, HUNTER, LACY, LAWYER, LEE, H. A. LIVINGSTON, LOOMIS, SPRAKER, VAN DYCK, WILLES—14.

*In the negative*: Senators L. BEARDSLEY, MAYNARD, SKINNER, STERLING, VERPLANCE, WAGER—6.

Whereupon the judgment of the supreme court was REVERSED, and the necessary orders entered.



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Westervelt v. The People.

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WESTERVELT vs. THE PEOPLE *ex relatione* W. S. Sears.

Leasehold estates or terms for years, and chattel interests, were not within the provisions of the Revised Statutes relative to the redemption of lands sold under execution; now, however, by the act of 1837, where leasehold property, in which the lessee or his assignee has an *unexpired term of at least five years*, is sold under execution, the property may be redeemed—so, also, where the lessee or assignee is possessed of any building erected on the demised premises.

ERROR from the supreme court. Westervelt, as sheriff of the city and county of New-York, by virtue of several writs of *fiert facias*, on 28th February, 1834, sold *all the interest* of the defendants in the execution, in certain *leasehold premises*, which had been demised on 21st March, 1833, *for the term of twenty-one years*, to *W. S. Sears* for the sum of \$400, who paid the amount of the bid, and claimed an *absolute assignment* of the premises purchased. The sheriff refused to give him any thing more than a mere certificate of sale. Subsequently, one *Storm* appeared and claimed the right to redeem the premises under a purchase made by him of the defendants in the execution, who had executed to him an assignment on the day that the premises were sold by the sheriff. The sheriff permitted *Storm* to redeem. The relator refused to receive the redemption money, and applied to the supreme court for a *mandamus*, commanding the sheriff to execute to him a deed of assignment of the premises. The *mandamus* was granted. See opinion of Judge COWEN, delivered in supreme court, 17 *Wendell*, 675, *et seq.* The sheriff sued out a writ of error. The cause was argued here by

*T. R. Green*, for the plaintiff in error.

*S. Stevens*, for the relator in supreme court.

After advisement, the following opinions were delivered :

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By the CHANCELLOR. The question presented in this case is, whether, previous to the act of May, 1837,\* a *term for years* in real estate was subject to redemption from a sheriff's sale, under the general provisions of the Revised Statutes; and whether it was so or not, depends upon the true construction and meaning of the term *real estate*, as used by the legislature, in the article of the Revised Statutes relative to executions against property: particularly in the forty-second and the several following sections of that article. 2 R. S. 370. The act of 1837, so far as a mere legislative construction can be used for the purpose of explaining the meaning of a previous statute, has disposed of that question; but as this case arose previous to that act, it becomes necessary for this court to examine the question as to the correctness of that construction.

The term *real estate*, when applied to an interest in lands or other real property, includes all estates or interests in such real property, which are held for life or some greater estate, but does not embrace terms for years and other chattel interests in land, which, as between the heirs at law and the personal representatives, belong to the latter, upon the death of the owner thereof. Hence it was settled that the act of 1813, which declared that judgments recovered in courts of record to be a lien, upon all the lands, tenements and real estate of the judgment debtor must be docketed, did not make the judgment a lien upon terms for years and other chattels real. *Putnam v. Westcott*, 19 Johns. R. 73. *Merry v. Hallett*, 2 Cowen's R. 497. The Revised Statutes, however, have unquestionably extended the lien of judgments and decrees to all such chattel interests in lands or other real property, by the addition of the term *chattels real* to describe such interests, 2 R. S. 182, § 96, 101; *id.* 359,

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\* The alternative *mandamus* in this case was granted in November, 1836, and at the ensuing session of the legislature, a law was passed extending the provisions of the Revised Statutes relative to the sale and redemption of real estate to *leasehold property*, where the lessee or his assignee has an unexpired term of at least five years; and also where the lessee or assignee is possessed of any building or buildings erected on the demised premises. *Statutes, Sess. of 1837, p. 540.*

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§ 3, 12 ; and the same term is used in the second section of the title of the Revised Statutes relative to executions and the duties of officers thereon. *Id.* 363. But in the second article of that title, which article contains the provisions relative to the redemption of property sold on execution, the terms *goods, chattels* and *real estate* are alone used, leaving it doubtful, in some cases at least, whether terms for years and other chattels real were intended to be embraced by the description of *chattels*, or by the term *real estate*. This latter term, as we have before seen, did not embrace chattel interests in real property according to the common law, and the act of 1813 relative to the lien of judgments. Hence we are left to conjecture, whether the legislature, by the use of the term *real estate*, meant to make such chattel interests, as well as freehold estates, redeemable when sold on execution. One reason for supposing that such interests were not intended to be embraced and made redeemable under the description of *real estate* is, that none of the provisions relative to redemption apply, either in terms or by necessary implication, to such interests ; and another reason is, that some of those provisions should have been differently framed, if it was intended that such interests should be redeemable ; I allude particularly to the provisions of the 46th and 64th sections. 2 *R. S.* 370, 374. The first, which provides for the redemption of the premises in case of the death of the owner, authorizes a redemption by the *heirs* or *devisees*, who are the proper persons to redeem a descendible freehold interest ; but it makes no provision for the redemption of a term for years, by the personal representatives of the decedent, upon whom the succession in such an interest in real property is cast by law, and in whom the legal title would be vested in case of redemption, for the benefit of the widow and next of kin or legatees. And the 64th section requires the property to be held in trust for the heirs of the purchaser, or the redeeming creditor, where he dies after the sale or redemption of the property, and before the conveyance by the sheriff ; but it makes no provision for the conveyance of a term of years in such a case to the personal representatives, in trust for legatees, or the widow and next of kin who would

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be entitled to such an interest in land, as personal property, under the statute of distributions. On the other hand, the term real estate, in some of the provisions of that article, particularly that which relates to the form of the execution, seems to have been intended to embrace every interest in real property which was subject to the lien of the judgment. 2 R. S. 267, § 27.

In this state of uncertainty as to what was the intention of the legislature in relation to the right to redeem chattel interests in land sold under execution, I am disposed to concur with the supreme court in giving the *common law meaning* to the term *real estate* in the provisions of the statute which relate to the redemption of property from such sales ; and, particularly, as the legislature has sanctioned that construction by the act of 1837, and has made a proper provision for all future cases. I shall therefore vote to affirm the judgment of the court below.

By Senator EDWARDS. The question here is whether *Storm*, the purchaser under the defendants in the executions, had a right to redeem. He had not such right unless it is given to him by the statute. The right to redeem is claimed under the 42d § of 2 R. S. 293, which declares that upon the sale of *real estate* by virtue of any execution, the officer making the same shall make out and subscribe duplicate certificates of such sale, containing a particular description of the premises sold, the price paid for each distinct lot or parcel, the whole consideration money paid, the time when such sale will become absolute, and that the purchaser will be entitled to a conveyance pursuant to law. The 45th § declares the time when and the terms on which it may be redeemed ; the 46th, 47th, and 48th sections, the persons who may redeem ; and the 49th § the effect of such redemption, which is to render the sale void. The only property this statute has authorized the redemption of, is *real estate* ; and unless it can be shewn that leasehold estate for a term of years is real estate, this was not a case within the provisions of the statute ; *Storm* had no right to redeem, and by paying the money to the sheriff he did not render the sale void.

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I am aware, the definition to real estate has been given exceedingly broad by elementary writers, and at first view it would appear to be sufficiently so to comprise this species of property. *Blackstone* says, that estates real, or things real are such as are permanent, fixed and immoveable. 2 *Black. Comm.* 16, 17. Chancellor *Kent* says, things real consist of lands, tenements and hereditaments. 3 *Kent's Comm.* 401. And in the case of *Vanderburgh v. Morris*, 1 *Johas. Cas.* 223, the court seem to assume that *tenements* include leasehold estates, and hence, probably, the inference has been drawn that leasehold estates were real estates. But it is evident the elementary writers, who have given this broad definition to the term *real estate*, never entertained the idea that leasehold estates for years were real estates; for when *Blackstone* treats of leasehold estates, he says they are called *real chattels*, being an interest issuing out of or being annexed to real estate; and he describes leasehold estates as possessing one quality of real estate and wanting all the rest, and hence he calls these estates chattels real. 2 *Black. Comm.* 386, 387. Most if not all the elementary writers, when speaking technically of the term *real estate*, confine and limit its meaning to a *freehold estate*, *Co. Litt.* 19, 20, *a*, *Perkins*, 114, *Preston on Estates*, 839, *Wood's Inst.* 114, and some of the authors to which I have referred exclude, in express terms, leasehold estates. I think, therefore, we are fully warranted in coming to the conclusion, that the legislature did not intend to embrace leasehold estates within the term real estate, but that they intended to make use of the expression *real estate* in its common, ordinary, well known meaning, for they have confined the provisions of the act to the *fee* of the land. The object the legislature appears to have had in view, was the protection of the rights of the owners of the fee of the land, by preventing it from being sacrificed on the sale by judgment creditors, and also to protect the equitable rights of judgment creditors who did not sell, and their representatives, by affording an opportunity to redeem according to the priority of their liens upon the real estate sold. But the legislature could not have had in view the interest of tenants for years in their

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leasehold estates, for judgments were not liens upon these estates. *Vandenburg v. Morris*, 1 *Johns. Cas.* 224. *Merry v. Hallett*, 2 *Cowen*, 497. A leasehold for any number of years is only a personal estate, and was bound only from the delivery of the execution, and not from the docketing of the judgment, which has no lien upon it. Besides, it is sold like other personal property. *Brewster v. Hill*, 1 *N. Hamp. R.* 350. 5 *Mass. R.* 419.

Our statute seems to recognize this species of property as personalty and not as realty. Hence it has declared leases for years shall be deemed assets, and shall go to the executors or administrators, to be applied and distributed as a part of the personal estate of the testator or intestate. 2 *R. S.* 24, § 6. The statute, in describing the property that may be sold and redeemed, describes it as *real estate* only. § 42. In declaring the time within which it may be redeemed, and the manner of redemption, it describes it as *real estate*, § 45; and in so declaring the effect of the redemption after sale, it describes it as *real estate*, § 49. Besides, if leasehold estate or other personalty was intended to be included, why was it not so declared in express terms? It was too important a portion of estates sold on execution, to have been casually or inadvertently omitted, or left to be inferred from the phraseology made use of in the statute. Again: is it reasonable to suppose the legislature would have selected this species of property on which the judgment was no lien, bound only by the delivery of the execution to the sheriff, and not have extended the right of redemption to all other property bound by the delivery of the execution, when this forms but a small proportion of such property. Nor can it be inferred from the principles on which the act itself is founded? Leasehold estates are often only from year to year, and frequently less than a year, and then expire; but by the statute, the right of redemption is from twelve to fifteen months, and if it were intended to be applied to this species of estates, the term would frequently expire before the expiration of the time to redeem; and as to all such cases, the statute would be perfectly nugatory.

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Again: if this species of property was included in the original act, why did the legislature, in the session of 1837, pass an act expressly for the purpose of subjecting the same property to the right of redemption?

From the best reflection I have been able to give to the case under review, I am decidedly of the opinion that the statute we are considering does not allow the right of redemption on leasehold estates for years sold on execution, and that the legislature which passed the act did not so intend; that previous to the passing of the act of 1837, it was a chattel interest, and liable to be sold like other chattel interests, without the right of redemption. I am of the opinion, therefore, that the sale is not affected by the redemption, but is still valid, and that it transferred the interest in the unexpired term to the relator, and that, therefore, the judgment of the supreme court should be affirmed.

By Senator VERPLANCK. The only question here is, whether the words *real estate* in the Revised Statutes relating to executions and sales under them, comprehends *terms for years* or chattels real, so as to give the debtor or his assignee a right to redeem.

It is quite clear, that in the sense of the English common law, the term *real estate* did not comprehend *terms for years*, which are chattels real and personal property; neither did the word *tenements*, though comprehending incorporeal as well as corporeal rights, apply to any estate in them for years only. Some *dicta* of former judges in the courts of this state contradict this, but they are certainly erroneous, if we take the words in their strict common law sense. The authorities collected by Judge Cowen are decisive to this point, if there could be any doubt; but the usage is uniform in English law.

Yet it appears that a looser sense of the phrases in question had crept into the former legislation of this state, as expounded by several decisions of our supreme court. Had the present case occurred before the revision and re-enactment of those statutes, I should have doubted whether the legislature had not intended to use the words *real estate* in the large and untechnical sense

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contended for by the plaintiffs in error. But in the revision of our statutes the strict legal sense of the phrase has been generally restored, and in this very title the words *lands, tenements, real estate* and *chattels real*, are used so as to make the distinction between them. The context, too, and the subsequent provisions as to the redemption, are only applicable to real estate in the old and strict sense. I cannot, therefore, doubt the intention of the legislature or the Revised Statutes to use these technical words of the common law in their strict sense, except where otherwise defined.

The decision of supreme court should be affirmed.

Whereupon the judgment of the supreme court was unanimously **AFFIRMED**.

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VAN CORTLANDT and others *vs.* TOZER.

Under the act of 29th January, 1811, revised and amended in 1813, the *record*, or a *certified copy* thereof, of any conveyance relating to lands *executed previous to 4th July, 1776*, and recorded in the office of the clerk of *any of the counties of this state*, whether the lands conveyed thereby, be situate in the county where the deed is recorded or not, is *evidence* in the same manner as the original conveyance would be, if produced and proved: so **HELD** in this case, where such deed was received in support of a title and possession under it for 44 years.

The act of 16th February, 1771, declaring that a deed *duly acknowledged* and recorded, or the *transcript* thereof, shall be evidence, applies as well to *deeds proved* by the subscribing witnesses and recorded, as to *deeds acknowledged* by the grantor.

Previous to that act, any judge of a court of common pleas had authority to take the acknowledgment or proof of a deed, although the land conveyed thereby was not situate in the county of which he was an officer.

**ERROR** from the superior court of the city of New-York. William R. Van Cortlandt and others, the heirs at law of William Ricketts Van Cortlandt, commenced an action of ejectment against Charles Tozer, for the recovery of part of a house-lot in



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the city of New-York. The property in question, was devised in 1754, by the grandfather of the plaintiffs, to his wife Mary, for life, with remainder in fee to his two sons, Philip Van Cortlandt and William Ricketts Van Cortlandt, as *tenants in common*. The testator died in 1756. In 1759, his widow married the Rev. Philip Hughes, and on the 8th April, 1770, she and her husband released her life estate in the premises to her son Philip. Mrs. Hughes died in 1789. William Ricketts Van Cortlandt married in 1765, and in 1783 became a *lunatic*, and continued in that state until his death in 1830; he left four children, three of whom are plaintiffs in this cause. On the part of the defendant was produced and read in evidence, a *certified copy* of the record of a deed from William Ricketts Van Cortlandt to his brother Philip, purporting to bear date 31st December, 1764, conveying the property in question, together with other property, to the grantee in fee. This deed purported to have been executed in the presence of two subscribing witnesses, and its execution to have been *proved* by one of the subscribing witnesses, before a judge of the court of common pleas of Queens county, on the 2d March, 1768, and to have been recorded in the clerk's office of that county on 20th July, 1771. The copy produced was certified by the clerk of the county of Queens in 1833; the counsel for the plaintiffs objected to its being read in evidence, but the objection was overruled. The defendant also proved, that in 1772, Philip Van Cortlandt mortgaged the premises in question to one Dennis Carlton, to secure the payment of the sum of £1200; that the mortgage was foreclosed, and under a decree in chancery, made in 1786, the premises were sold to one Jonathan Pearsy, who was shown to be in possession of the same in 1791, and under his title it has been held ever since. Philip Van Cortlandt occupied the premises in question during the revolutionary war; he was a major in the British army, and at the close of the war went with his family to England. He never returned to this country, and has been dead several years. The jury, under the charge of the presiding judge, found a verdict for the defendant, on which judgment was entered. The plaintiffs

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sued out a writ of error, removing the record into the supreme court, where the judgment was *affirmed*. See the opinion delivered in that court, 17 *Wendell*, 339, *et seq.* The plaintiffs then removed the record into this court, where the case was argued by

*S. D. Craig & G. Wood*, for the plaintiffs in error.

*D. Lord, jun. & G. Griffin*, for the defendant in error.

In support of the objection to the admission of the *transcript* of the deed in evidence, *the counsel for the plaintiffs* urged that there was no legal record of the deed; that the acts of 1710 and 1771 in force *at its date* did not, nor did any usage of the then colony authorize it to be proved or recorded in the manner and form in which it appeared. They further insisted, that the first section of the act of 1811, was not intended to sanction and legalize it as a valid record, and make it legal evidence, because,

1. If the legislature had intended by that section to legalize unlawful records of deeds, they would have used clear and appropriate language to convey that intent, and to carry that provision into effect.
2. Inasmuch as such a provision would impair and affect the antecedent rights of others, the court ought not to *presume* that the legislature intended to introduce it, unless expressed in *plain words*, or by clear implication.
3. The language used does not convey such an intention, but refers manifestly to records *duly* and lawfully made.
4. The language used should be taken distributively *reddendo singula singulis*, and refers to records of deeds in the *respective counties*, agreeably to the common *mode of expression* in such cases, and to the usage of the legislature in *similar acts pari materia*.
5. There was no ~~inconvenience~~ arising from an antecedent usage to record deeds in counties in which the land did not lie, that could render it proper or expedient for the legislature to introduce such a provision.
6. The act of recording deeds in counties where the lands *did not lie*, would be inconvenient and unreasonable, whether the object of recording be to furnish actual evidence or constructive notice of the con-

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veyance, and would encourage and promote fraud, and therefore it is not to be presumed that the legislature intended to sanction it. 7. The object of the first section of the act, as the whole context shows, was to authorize the records of deeds made under the colonial government in private local offices to be evidence in the state courts, and to remove any doubt on that subject.

After advisement, the following opinion was delivered :

By the CHANCELLOR. The only material question in this cause is, whether the transcript of the deed of December, 1764, from the ancestor of the plaintiffs, to his brother Philip Van Cortlandt, under whom the defendant has derived his title to the premises in controversy, was legal evidence for the defendant upon the trial in the court below. This depends in some measure upon the construction of the first section of the act of January 1811, concerning the record of certain ancient conveyances; which section was substantially the same as the sixth section of the general recording act of April, 1813. 1 *R. L. of 1813*, p. 371. Independent of this statutory provision, however, I am inclined to think this record would have been good secondary evidence of the deed of 1764, upon due proof that the original deed could not be found. The premises had been held in conformity with this deed for more than forty-five years before the trial, and subsequent to the death of the tenant for life, who died in 1789. If the original deed had been produced, it might therefore have been given in evidence, without any proof of the execution thereof by the grantor. It is also a well known historical fact, that the British refugees, who left this state at the close of the revolution, generally carried off their title deeds with them, to prevent the confiscation of the property under previous acts or judgments of attainder, or for the purpose of obtaining a remuneration from the British government for the loss of such property. The question does not, however, appear to have been raised upon the trial as to the admissibility of the record as secondary evidence, independent of the statute. Neither was the

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best secondary evidence produced. For the certified copy of the clerk was only the copy of a copy, which was not admissible as secondary evidence, where the original copy could have been produced, unless it was a case provided for by the statute. The defendant's counsel are thrown back, therefore, upon their original position, as to the validity of the certified copy of the deed as evidence under the provision in the recording act of 1813.

It is supposed by the counsel for the plaintiffs in error that the only object of the first section of the act of 1811, and of the sixth section of the act of 1813, was to provide for the giving in evidence of an authenticated copy of the record of a deed or other conveyance, recorded in the county where the lands were situated, instead of producing the original record itself. If that was the object of the statute, it is very difficult to conjecture why it was confined to ancient deeds only which were executed previous to July, 1776, instead of being extended to all conveyances executed either before or after that time, and also to deeds recorded in the secretary's office. Upon examination, also, it is found that for any other object, than that of making the record or the transcript of a deed recorded in the *wrong* county previous to the revolution, legal evidence of the existence of such an ancient deed, these legislative provisions were entirely useless and uncalled for, under the laws then in force as to all deeds properly recorded previous to the revision of 1788. By an express provision of the act of the 26th of February, 1788, 2 *Greenl. Laws*, 99, § 1, the record of every deed or conveyance theretofore executed, and duly atknnowledged or proved, and recorded in the office of the secretary of state, or in the clerk's office of the county where the lands were situated, might be read in evidence in any court in this state without further or other proof of such deed or conveyance; and the statute further declared, that either the record *or a transcript thereof*, might be given and received in evidence. No further statutory provision, therefore, could have been necessary to render the transcript of the record of such a deed legal evidence, provided the deed had been recorded in the county where the lands were

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situated. But there was a large class of cases to which the act of 1811 would apply as well as to the case under consideration ; for although it was not usual, subsequent to the act of October, 1710, to record deeds in counties where no part of the premises conveyed were situated, it very frequently happened that the deed embraced lands lying in several counties, and that such deeds were by mistake recorded in one of those counties only, instead of being recorded in all, or in the office of the secretary of state. Besides, the fact that so many original conveyances were lost by the events of the revolution, or were placed beyond the reach of those who had become entitled to lands under the same, by being carried out of the county by refugees, rendered it perfectly proper that the legislature should allow a species of secondary evidence in relation to such conveyances, which it might have been dangerous to have extended to those of a more recent date ; particularly to those which were recorded after the declaration of independence, when it was probable that many antedated deeds from attainted persons were put upon record in those counties which were in possession of the enemy, for the purpose of saving their lands from forfeiture. I have no doubt, therefore, that the deed in question was embraced by the acts of 1811 and of 1813, provided it had been duly acknowledged or proved, according to the common law of the province as it existed previous to the act of the 16th of February, 1771. 2 *Van Schaack's Laws of N. Y.* 611. That question I will now proceed to consider.

The act of 1771 does not profess to declare that none but a judge of the court of common pleas where the land lay could take the acknowledgment or proof of a deed before that time, with a view to its being recorded, nor to declare invalid any conveyance theretofore executed and proved or acknowledged. Its object was to confirm certain conveyances by *femes covert* theretofore made, and regulate and restrict the mode of conveyances by *femes covert*, and the recording of all deeds and conveyances thereafter to be executed. But the preamble of that act is important in showing what the ancient practice in the

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colony up to that time had been, as to the proof or acknowledgment of deeds to entitle them to be recorded. As I understand the case of *Doe v. Roe*, 1 *Johns. Cas.* 402, cited by the plaintiff's counsel, the record of the deed, offered in evidence in that case, was not rejected on the ground that a deed could not be recorded on proof of its execution by a *subscribing witness* thereto ; but on the ground that the scrivener who proved the execution of the deed was not one of the subscribing witnesses. Although the act of 1710 speaks only of deeds *duly acknowledged*, the recital in the act of 1771 shows that the *practical construction* of the former act had been to allow deeds to be recorded which had been *duly proved* by a subscribing witness, as well as those which had been actually acknowledged by the grantor in person, before the officer who allowed the same to be recorded. What was the origin of this custom, which by the usages of a century, at length became a part of the common law of the province of New-York, does not distinctly appear, and cannot now be known. That such a custom existed, at a very early day in the colony, is evident from the records of Dutch transports, or conveyances, still in existence. The custom of executing or acknowledging the transport in the presence of a magistrate was probably brought by the early Dutch settlers from Holland, where, under the proclamation of Charles V. as count of Holland and of Flanders, issued in 1519, it was necessary to the validity of a transport or conveyance of immovable property, that it should be made before the magistrate of the place ; and the custom of proving the execution of the conveyance by a subscribing witness, where it was inconvenient for the grantor to go before the magistrate to acknowledge it personally, was probably derived from the common law of England in relation to enrolments of deeds, which allowed of such proof by a subscribing witness, as a substitute for a personal acknowledgment. *Winscomb v. Dunches, Godbolt's R.* 270. But whatever may have been the origin of the custom, such was the settled law of the colony at the time the conveyance in question was executed, and the time it was proved by one of the subscribing witnesses, before a judge of

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Queens county. The statute of 1771 also recites the fact that it had been the custom to record such conveyances, upon proof or acknowledgment of the due execution thereof before a judge of a county court, as well as before a judge of the supreme court, or a master in chancery, or a member of the council ; and there is nothing to show that the acknowledgment or proof was *confined* to a judge of the county where the lands were situated, previously to the act of 1771. I infer, therefore, that it was not so restricted previous to that time ; and that the deed in question was duly proved according to law, so as to entitle a transcript of the record thereof to be read in evidence under the sixth section of the act of 1813, although such deed was recorded in the wrong county.

For these reasons I think the judgment of the courts below should be affirmed.

On the question being put, *Shall this judgment be reversed ?* the court *unanimously* decided in the *negative*. Whereupon the judgment of the supreme court was **AFFIRMED**.

## Mills v. Hunt.

## MILLS and others vs. HUNT.

Where goods, amounting in the aggregate to upwards of \$100, are purchased at auction, in several parcels, upon distinct and separate bids, to be paid for in a note at a future day, the whole constitutes but one contract, and the delivery of some of the parcels is sufficient to take the case as to the residue, out of the operation of the statute of fraud.

Upon the sale of goods for an approved endorsed note, in case of question as to the character of a note tendered, it seems the purchaser is bound to prove, either that the vendor knew the note to be good, or had the means of conveniently ascertaining the fact.

An auctioneer acting as the agent of another in the sale of property, is personally responsible as vendor, unless at the time of the sale he disclose the name of his principal; his general employment as auctioneer is not per se notice that he acts as agent.

It seems that even when an agent discloses the name of his principal, he is personally liable where he signs in his own name a written contract which does not upon its face show that he contracts as agent.

ERROR from the supreme court. Hunt brought an action in the New-York common pleas for the non-delivery of goods purchased by him at a sale by the defendants as auctioneers; the terms of sale were approved endorsed paper at six months for sums over \$100, and under that amount cash, without discount. The plaintiff purchased five parcels, which were separately struck off to him, and amounted together to the sum of \$224.40. A bill of parcels was delivered to the plaintiff, headed "L. J. Hunt, bought of Mills, Brothers & Co." the latter being the name of the defendants' firm, and he was directed to call on the owners for the goods, which were not present at the sale, but were sold by sample. He accordingly called on one of the owners, and received four of the parcels, but not receiving the fifth, he proceeded to the counting-house of the defendants, and tendered to a clerk there an endorsed note for the amount of his bids, and demanded the goods purchased by him, telling him at the same time that if he did not like the note, he would give him the money, deducting the discount. The clerk answered that "he knew nothing and said nothing." All this was in the presence, and hearing of one of the defendants, and the clerk when subsequently called by the defendants as a witness, testified



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that they expected difficulty and trouble with the plaintiff about the goods, and had determined to say nothing about the matter, because they apprehended a law suit. It appeared on the trial that the goods did *not* belong to the defendants, and that in the sale they acted *merely as agents*, but nothing on that subject was stated at the time of the sale. The plaintiff proved the value of the *fifth* parcel, and rested. The defendants' counsel moved for a *nonsuit*, on the grounds : 1. That the contract was void within the statute of frauds ; 2. That the tender of the note was not sufficient ; 3. That the action would not lie against the defendants, they having acted *merely as agents*, the *principals* being known ; and, 4. That there was no proof of damage. The presiding judge denied the motion for a nonsuit, and the jury under his charge found a verdict for the plaintiff, on which judgment was entered. The defendants removed the record into the supreme court, where the judgment was *affirmed*. See opinion delivered in supreme court, 17 *Wendell*, 375, *et seq.* Whereupon the defendants sued out a writ of error, removing the record into this court, where the case was argued by

*T. Sedgwick, jun.* for the plaintiffs in error.

*J. R. Whiting*, for the defendant in error.

*Points for plaintiffs in error :*

1. The plaintiffs in error in this cause were mere agents for the sale of the property, and had nothing to do with its delivery.

2. The purchase of each article struck off was a distinct contract. 2 *R. S.* 70, 2d ed. *Simon v. Motivos*, 1 *Black. R.* 600. *Rugg v. Minett*, 11 *East.* 216. *Emerson v. Heelis*, 2 *Taunt.* 38.

3. At all events, the contracts were distinct in regard to the different owners.

4. Whether this be so or not, the delivery of a part by one owner could not bind the auctioneer as to the part not delivered by another owner ; the delivery not being in any respect a part execution of the alleged entire contract of sale.

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5. The memorandum or bill of sale is not sufficient to take the case out of the statute of frauds. *Hicks v. Whitmore*, 12 *Wendell*, 548.

6. There was no sufficient tender. *Hicks v. Whitmore*, 12 *Wendell*, 548. *Dunham v. Jackson*, 6 *id.* 22.

*Points for defendant in error :*

1. The auctioneers, not having disclosed their agency, may be treated as principals. *Hanson v. Roberdeau*, *Peake's N. P. C.* 120.

2. The sale, although in parcels, on distinct biddings, is to be treated as one sale. *Baldy v. Parker*, 2 *Barn. & Cress.* 37.

3. The delivery of the bill of parcels with the partial delivery of the goods, takes the case out of the statute of frauds. *Descard v. Bond*, *Stark. Ev.* 610, *pt.* 4, *n. k.* 2 *R. S.* 70, § 3.

4. The tender of the note was sufficient.

After advisement, the following opinions were delivered :

By the CHANCELLOR. The sale of the several articles in this case was made by Mills, Brothers & Co. and the bill of parcels made out in their copartnership name, without disclosing the fact that they were acting as the agents for others. The mere fact that they were *auctioneers*, was not sufficient notice to the purchaser that they were not selling their own goods. *Jones v. Littledale*, 1 *Nev. & Perry's R.* 677. In the case of *Magee v. Atkinson*, 2 *Mees. & Wels. R.* 440, where the broker had sent in a note of the sale to the purchaser in his own name, it was held that evidence of a custom in Liverpool, to send in brokers' notes without disclosing the name of the principal, could not be received for the purpose of protecting the broker from personal liability. At this day the law must be considered as settled, that a vendor or purchaser dealing in his own name, without disclosing the name of his principal, is personally bound by his contract ; and it makes no difference that he is known to the other party to be an auctioneer, or broker, who is usually employed in selling property as the agent for others. Even where he disclo-

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ses the name of his principal, if he signs a written contract in his own name merely, which contract does not upon its face show that he was acting as the agent of another, or in an official capacity in behalf of the government, he will be personally bound thereby.

The bill of parcels which was delivered in this case, although it does not upon its face contain the necessary requisites to take the case out of the statute of frauds as a written contract for the sale and delivery of the goods, is still to be regarded as evidence that the several articles purchased by Hunt at the same auction sale, though in different bids and upon different catalogues, were considered by the vendors as embracing one contract, and upon which the vendee was entitled to credit for six months, as the whole amount of his purchases at that sale exceeded \$100. He was in the situation of a purchaser who goes to a store and buys different articles at separate prices for each article, under an agreement for a credit of six months, upon approved paper for the aggregate amount of such sales; in which case there can be no doubt that a delivery of a part of the articles so purchased, without any objection at the time as to the delivery of the residue, is sufficient to take the case out of the statute of frauds as to the whole goods so purchased. *Shirley v. Heyward*, 2 H. Black. 509. *Baldey v. Parker*, 2 Dowl. & Ryl. 222. *Elliott v. Thomas*, 3 Mees. & Wels. 170. The case would be different where the purchaser, either at a public or private sale, paid for and took a delivery of some of the separate articles only, leaving the residue undelivered and wholly unpaid for; or where several articles were purchased at the same time to be paid for on delivery, and the purchaser afterwards received and paid for some of the separate articles only. *Morton's Law of Vend.* 59. The nisi prius decision of Lord Ellenborough, in *Hodgson v. Le Bret*, 1 Campb. R. 233, conflicts with the subsequent decision of the court of king's bench in *Baldey v. Parker*; and it was distinctly overruled by the court of exchequer in the more recent case of *Elliott v. Thomas*. The delivery in the present case was a delivery of four out of the five parcels from

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the entire bill, and the only reason why the fifth parcel was not then delivered was, because it was not on the catalogue of the agent who made the delivery of the residue ; but there was no intimation at the time, that the auctioneers intended to deliver this part of the goods only. The subsequent refusal to deliver the fifth parcel was, therefore, a breach of the contract on their part, for which the purchaser was entitled to a remuneration in damages.

The tender of the note to the clerk, under the circumstances of this case was, unquestionably, sufficient. A tender to the clerk of the firm, who had a general authority to receive payment, was as valid as a tender to his principals. If one of the members of the firm was present, and had any objection to the note offered, it was his duty to speak ; and if the vendors had revoked the general authority of the clerk in this particular case, for the purpose of avoiding the effect of a tender, and kept out of the way themselves, it ought not to protect them from liability.

Upon a sale of goods for an approved endorsed note, if upon the note's being tendered, the vendor makes no objection to it, the note must be presumed to be good until the contrary appears. But if it is objected to by him at the time, on the ground that it is not good, the burthen of proof is thrown upon the vendee to show that it was such a note as the vendor ought to have received and approved ; and such as he either knew to be good or had the means of ascertaining to be so, without any unreasonable trouble. In this case, however, the refusal to receive the money instead of the note, shows that the note was not refused on any such ground.

Upon the whole there is no reason to doubt the correctness of the decisions of the courts below upon all the questions raised in this case. I think the judgment should, therefore, be affirmed ; and in my opinion it is a proper case for double costs, to compensate the defendant in error for the extra costs to which he has been subjected by this unreasonable litigation.

By Senator EDWARDS. I am for affirming the judgment of the supreme court for the following reasons :

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1. The auctioneers not having disclosed their agency and made known their principals, must be held personally responsible.

2. The property having been sold to the same individual at the same sale and under the same terms, though in separate parcels and for different prices, was virtually a sale under one contract, *Baldev v. Parker*, 9 Com. Law R. 16; and therefore a delivery of part of the goods was sufficient to take the case out of the statute of frauds. 2 *Starkie on Ev.* 610. 2 R. S. 70, § 3.

3. A tender to an agent, clerk or servant, authorized to receive money in the transaction of the business of his principal, is as valid as a tender to the principal. *Goodland v. Bluwith*, 1 Campb. 478. *Moffat v. Parsons*, 5 Taunt. 307. 1 Esp. R. 350. The plaintiff, therefore, complied with the terms of the contract on his part, the responsibility of the parties to the note not having been objected to; and the defendants are liable to respond in damages for not having performed upon their part.

Upon the question being put, *Shall this judgment be reversed?* all the members of the court decided in the negative.

Whereupon the judgment of the supreme court was unanimously **AFFIRMED.**

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## FOX vs. PHELPS.

Where a testatrix devised real estate to two of her children without words of perpetuity, and directed that on the happening of a certain contingency, the estate devised should be *valued*, and that the devisees should pay *an equal part* of it to two others of her children; IT WAS HELD, that the *charges* thus imposed upon the devisees gave them a *fee* by implication.

*It was further held*, that if the devise could be considered as giving an *estate upon condition*, that the breach of the condition by non-performance would not, *ipso facto*, operate as a forfeiture of the estate, there being no devise or limitation over restricting the continuance of the first estate; and that the only effect of a breach was to give a right of entry to the heir.

*It was further held*, that performance of the condition would be *presumed*, when 29 years had elapsed after the cause of action accrued before suit brought.

*It seems* that where a *trust estate* is created by *implication*, no greater estate will be implied than what is necessary to satisfy the object of the trust.

ERROR from the supreme court. This was an action of ejectment, brought by Fox against Phelps, in the superior court of law of the city of New-York, for the recovery of the undivided *fourth* part of a house and lot. - The plaintiff proved that his grandmother, *Catharine Thorne*, died seized of the premises; that she left *five* children her heirs at law; that one of them, named *Thomas*, died in 1807 or 1808, without issue, and that another, *Abigail*, the mother of the plaintiff, was born in 1784; in 1802 she married one *Warren Fox*, who died in 1805; that in 1807 she married *Peter Conti*, and in 1810 died, leaving the plaintiff, her son and only heir at law, who was born in 1803, and in 1834 commenced this suit. The defendant deduced title to the premises in question under the *last will and testament* of *Catharine Thorne*, which was executed on the 28th September, 1787. The will commences in these words: "As for my temporal estate I give and bequeath in manner following," and after directing the payment of her debts, the testatrix gives the sum of *two pounds* to her son *William*, as an acknowledgment and in lieu of his *birthright*. She then by the *third clause* of the will devises unto her sons *Henry* and *Isaac* the premises in question, without adding words of perpetuity, and directs that after her

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decease the premises shall be let, and that the moneys arising from such letting shall be applied *by her executors* for the maintenance, support and education, of her two children, *Thomas* and *Abigail* : of *Abigail* until she should arrive to the age of 21 years or until the day of her marriage, whichever should first happen ; and of *Thomas* until he should arrive to the age of 15 years. The *sixth* clause of the will is in these words : "6 *Item*. It is my will and devise, and I do hereby require and direct, and I do order and require my said executors hereinafter named, that when my said daughter *Abigail* shall arrive to her age or day of marriage, that then the real estate shall be *valued*, and the said *Henry Thorne* and *Isaac Thorne* shall *and they are respectively required to pay an equal part* of my estate *to the rest* in cash; but in case my said daughter *Abigail* should happen to die before she should be of age or day of marriage, then my said real estate to be kept and detained in the hands and possession of my said executors until my said son *Thomas Thorne* shall be of his full age, and after that the same shall be equally divided between them share and share alike." The time of the decease of the testatrix was not shown, but it appeared that in 1800 *Isaac Thorne* released his interest in the premises to his brother *Henry*, who was in the receipt of the rents of the same until *April*, 1811, when he conveyed to one *Samuel Mills*, from whom the defendant deduced a regular title. *Henry Thorne* died about the year 1825, and *Isaac Thorne* in 1834. The evidence being closed, the presiding judge charged the jury, and decided that *Henry* and *Isaac Thorne* took by the will of *Catharine Thorne*, their mother, an *estate in fee* in the premises in question, subject to the provisions and payments out of the same to and for their sister and brother, as directed by the will, which were either charges upon the estate or trusts affecting it. But that if, however, the estate of *Henry* and *Isaac* under the will was a *conditional estate*, the conditions were such that the jury might, after the lapse of time that had occurred, and under the evidence in the case, presume that they had been performed or satisfied to the parties interested in them ; and

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further, that on the question of *adverse possession*, the fact of possession being shown, if the jury were of opinion that it was an adverse possession, and had continued so for twenty-five years, then the defendants would be entitled to their verdict on that ground ; the plaintiff's rights (if any he had) not being saved by any statutory exceptions, nor the right of entry postponed by any estate for life : to which decision and charge, the counsel for the plaintiff excepted. The jury found a verdict for the *defendant*, on which judgment was entered. The plaintiff sued out a writ of error, removing the record into the supreme court, where the judgment was *affirmed*. See opinion delivered in that court, 17 *Wendell*, 397, *et seq.* The plaintiff thereupon removed the record into this court, where the case was argued by

*S. Sherwood & G. Wood*, for the plaintiff in error.

*G. Griffin*, for the defendant in error.

*Points for the plaintiff in error:*

1. The plaintiff, as heir at law of Abigail Fox, who was the daughter, and one of the heirs at law of Catharine Thorne, establishes his right to at least one fourth of the premises in question. But the will of Catharine Thorne, the ancestor of the plaintiff, being introduced, the following points are raised :

2. The devise to Henry Thorne and Isaac Thorne of the *house and lot*, without words of inheritance or limitation, passes a life estate merely. *Denn, ex dem. Gaskin v. Gaskin, Cowp.* 657. *Wells v. Wells*, 9 *Johns. R.* 222. *Newkirk's case*, 14 *id.* 198. *Jackson v. Bull*, 10 *id.* 148. *Jackson v. Haines*, 8 *id.* 141. *Lambert's Lessee v. Paine*, 3 *Cranch*, 130. *Jackson v. Merrill*, 6 *Johns. R.* 192.

3. The fourth, fifth and sixth items or clauses of the will should be taken and construed together as furnishing an entire disposition of one and the same subject matter ; and supposing the estate devised to Henry and Isaac to be a fee, it was a conditional fee in expectancy, and there is a legal estate in possession for a limited period in the executors, and vested in them for the



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purposes therein described, because they are to have the possession and the entire rents and profits for the *period* limited, viz. until the arrival at age or the marriage of Abigail, which is sufficient to give the *estate*, both at law and in equity, to them for that period. *Doe v. Briggs*, 2 *Taunt.* 109.

4. The estate of Henry and Isaac being an expectancy and upon a contingency, they must show the event performed to entitle them to an absolute estate, by evidence, either direct or circumstantial, whether it be a *condition* or a conditional limitation.

5. There was no such evidence in this case.

6. If there had been such evidence, the jury could not have passed upon it under the charge of the judge.

7. There was no evidence in this case which could bar the plaintiff under the statute of limitations. *Jackson, ex dem. Bogert and others, v. Schaubert*, 7 *Cowen*, 187; 2 *Wendell*, 13, *S. C.*

8. If there had been such evidence, the jury could not have passed upon it under the charge of the judge.

*Points for the defendant in error:*

1. The will of Catharine Thorne, the common source of title, vested in her sons Henry and Isaac, an estate in fee simple in the premises. *Hogan v. Jackson*, *Cowp.* 299. *Jackson v. Merrill*, 6 *Johns. R.* 185. *Jackson v. Babcock*, 12 *id.* 389. *Jackson v. Housel*, 17 *id.* 281. *Earl v. Grim*, 1 *Johns. Ch. R.* 494. *Finlay v. King*, 3 *Peters*, 379. 2 *Preston on Estates*, 206, 207, 217. *Jackson v. Bull*, 10 *Johns. R.* 148. *Jackson v. Martin*, 18 *id.* 31. *Collier's case*, 6 *Coke*, 16. *Jackson v. Billinger*, 18 *Johns. R.* 381. *Wellock v. Hammond*, *Cro. Eliz.* 204. *Boraston's case*, 3 *Coke*, 21. *Mary Portington's case*, 10 *Coke*, 41. *Crickmere v. Patterson*, *Cro. Eliz.* 146. *Co. Litt.* 236, b. *Tunstall v. Bracken*, *Amb.* 167. *Cruise, tit.* 38, *Devise, ch.* 11, § 22, 48. *Frogmorton v. Holiday*, 3 *Burr.* 1618. *Freak v. Lee*, 2 *Shower*, 30.

2. If the payment of the pecuniary shares to the other children of their mother, was necessary to the consummation of the title

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of Henry and Isaac Thorne, such payment is in judgment of law, to be presumed from the lapse of time.

After advisement, the following opinions were delivered :

By the CHANCELLOR. The will in this case is very inartificially drawn, and it is somewhat difficult to determine whether the testatrix intended that her sons Henry and Isaac Thorne, should lease the premises and pay over the rents and profits thereof to the executors, to be by them applied to the support and education of the two minor children ; or whether she intended that the executors should themselves let the premises, and receive the rents and profits from the tenants for the same purpose. In the first case, the legal estate would immediately vest in Henry and Isaac, upon the death of their mother, under the third clause in the will, subject to the charge, or trust, of collecting the rents and profits and paying them over to the executors during the prescribed period : and in the last, the executors took a trust term by implication, which terminated upon the marriage of Abigail, (Thomas having arrived at full age long before that time,) for where a trust estate is created by implication merely, no greater estate is implied than such as is necessary to satisfy the object of the trust. *Doe v. Simpson*, 5 *East's R.* 162. *Doe v. Needs*, 2 *Mees. & Wels.* 129. It is, therefore, perfectly immaterial to the rights of the parties in this suit, whether the legal estate was in the executors, or in Henry and Isaac, previous to the marriage of Abigail. In either case Henry and Isaac were seized of a vested remainder in fee immediately upon the happening of that event, under the *third* clause of the will, subject to the payment of one half the value of the premises at that time to their younger brother and sister, according to the directions contained in the *sixth* clause. That this charge upon the persons of these devisees, of one half the value of the estate in fee, in respect to the land devised to them in the third clause of the will, is sufficient to create a fee by implication in such land, cannot well be doubted, since the decision of this

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court in the case of *Spraker v. Van Alstyne*, 18 *Wendell*, 200. Here the devisees are to pay one half of the value of the fee, which might be of much more value than a life estate in the whole premises, liable to be terminated at any moment ; and this brings the case within the reason upon which the rule as to an implied fee without words of perpetuity is founded, although the amount of the personal charge cannot exceed half the value of a fee simple estate in the property devised. Neither can it make any difference in respect to the application of that rule of construction, that the estate, in respect to which the charge is made upon the person of the devisee, is a future or a contingent estate, if the charge upon the person is as certain as the vesting of the estate, as it necessarily was in this case.

The payment of one half of the value of the premises to Abigail and Thomas was not a conditional limitation of the estate, so that the estate would be actually divested by the non-payment of the money at the day, and without entry for a breach of the condition. Where there is a devise upon a condition, and the estate is devised over to a stranger upon the breach or non-performance of the condition, that condition is usually construed to be a limitation restricting the continuance of the first estate, so that the first estate is determined without entry or claim, and the limitation over to the stranger immediately commences in possession, upon a breach of the condition. But where there is no limitation over of the estate upon a breach of the condition annexed to the preceding estate, it is not construed to be a conditional limitation, but an estate upon a condition subsequent, at the common law ; so that the *heir* must enter for a breach of the condition, to determine the estate, unless it is evident from the will that the testator intended it as a conditional limitation of the estate merely. Here no estate over was given to Abigail and Thomas, the legatees, or to any other person, upon the neglect or refusal of the devisees to pay the legacies of the half of the value of the premises. And the heirs at law, of whom William was one, could alone enter or claim any interest in the estate, at law, upon a neglect or refusal to pay the money ; although a

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court of equity might compel the devisees to pay if they took the estate devised to them, or might cause the money to be raised out of the estate devised to them by a sale of the estate to satisfy the charge. Neither could it have been the intention of the testatrix in this case, that the legal estate should either be in abeyance until the payment of the money, after the marriage or arrival at age of the daughter; or that the devisees should actually lose the estate by the non-payment of the money the moment it became due. From the very nature of the case, if Abigail married before she was twenty-one, some time must necessarily elapse, after the time appointed for the beneficial interest of the devisees to vest in possession, before the premises could be valued and the money paid; and such marriage might take place a long time before it was known to the devisees. This devise, therefore, cannot properly be construed to be a conditional limitation; and if it was not an absolute fee charged in equity with the payment of the legacy, it was an estate upon a condition subsequent; which estate could only be divested by an entry of the heirs at law for a breach of the condition. And as no such entry had been made, but the devisees and those claiming under them had been permitted to enjoy the property for nearly thirty years after the plaintiff's mother became of age, and discoverd, in 1805, so that there was no legal obstacle to her exercising the right to enter as one of the heirs at law, the legal presumption was that the money had been paid and that the condition had not been broken.

The judge was also right in his instructions to the jury, that they were authorized to presume a payment after such a lapse of time, whether it was a conditional limitation of the estate, or an estate upon a condition, either subsequent or precedent; and upon the evidence in the case, he probably should have told them it was their duty to presume a payment, as there was nothing to rebut such a presumption. The money to be paid to Thomas and Abigail was in the nature of personal legacies to them; and the husband of the latter, at any time after the marriage in 1802, was authorized to receive the part of the money belonging to

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her, as personal property vested in him by the marriage, and subject only to her equity therein. Again : Abigail remained unmarried for about two years after the death of her first husband, and when she was of full age ; and if the money had not been paid to her husband previously, it belonged to her by right of survivorship, and there was nothing then to prevent her from collecting it for her own use and benefit. If it still remained unpaid at the time of her second marriage, *Conti* became entitled to it as a part of her personal estate, subject to her equity ; and, upon her death, he became absolutely entitled to the whole, under the statute of distributions. Even that event occurred in April, 1810, twenty years before the commencement of this suit, and the fact that the plaintiff who was *not* entitled to the money was then an infant, could not possibly rebut the presumption that the surviving husband, or the personal representative of his deceased wife, who was legally entitled to collect or receive the money, had so received it.

The judgement of the court below was therefore not erroneous, and it should be affirmed.

By Senator EDWARDS. The principle question involved in the case under review appears to be, whether the will of Catherine Thorne, the common source of title, vested in her sons, Henry and Isaac, an estate in fee simple in the premises in question, or only a life estate. If the devise gave them a fee simple, then the charge of the judge was right, and the judgment of the supreme court should be affirmed, and it becomes unnecessary to consider the remaining questions raised in the case ; for if they had the absolute fee by the will, it is unnecessary to enquire whether there was a condition or not, or whether by presumption of law it should be considered as satisfied if there was one, or whether the defendants were entitled to the verdict of the jury, on the ground of adverse possession ; nor is it certain that the jury passed upon either of these questions. If they considered the will cast the fee, as the judge decided and charged, then it was unnecessary they should consider either of the other questions raised. Was the judge right, therefore in charging the jury that

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Henry and Isaac took by the will of their mother an estate in fee in the premises in question ? I am of the opinion that the charge in this particular was right.

I concede, that as well in a devise as in a deed where there are no words of perpetuity, or any thing expressed from which a fee by implication can be inferred, the devisee takes an estate for life only. *Dunn v. Gaskin*, Cowper, 557. *Jackson v. Wells*, 9, Johns. R. 223. *Jackson v. Emble*, 14 id. 198. But no technical words are necessary, and if the testator make use of such expressions as plainly import his intention to cast the fee, it is sufficient. A devise to one of all the testator's estate, or to one of all the property of the testator, (the testator owning the fee,) casts the fee; for these expressions include his whole interest. *Cowper*, 557. *Lessee v. Paine*, 3 Cranch, 97. *Jackson v. Babcock*, 12 Johns. R. 389. *Jackson v. Housel*, 17 id. 281. Although there are no direct words of perpetuity in the will we are now considering, I think from the expressions made use of in it, the testatrix intended to dispose of the whole of her real estate. She commences by saying, "As for my temporal estate, I give and bequeath it in the following manner," &c. ; and in the sixth clause of the will she says, "After my daughter Abigail shall arrive to her age or day of marriage, that then the *real estate* shall be valued, and the said Henry Thorne and Isaac Thorne shall, and they are respectively required to pay an equal part of *my estate* to the rest in cash ; but in case my said daughter Abigail should happen to die before she be of age or day of marriage, then my *said real estate* to be kept, &c. These, and other expressions contained in the will, appear to me to show that the testatrix intended to dispose of the whole of her *real estate*, and of course the fee; for a disposition of all her estate would include the fee. But what appears to me still more conclusively to show that this will carries with it an estate in fee, is the provision in the *sixth* clause, which creates a direct personal charge upon Henry and Isaac on Abigail's marrying or arriving at the age of twenty-one years ; for it expressly declares that when her said daughter Abigail arrived to her age or day of marriage,

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her real estate should be valued, and Henry and Isaac should be respectively required to pay an equal part of her estate in cash. The rule is well settled, that where the charge is upon the person of the devisee, in respect to the estate in his hands, he takes a fee; but where the charge is upon the estate only, it is otherwise. *Spraker v. Van Alstyne*, 18 *Wendell*, 200. *Jackson v. Bull*, 10 *Johns. R.* 151. *Goodtitle v. Madern*, 4 *East*. 496. *Doe v. Snelling*, 5 *id.* 87. *Moore v. Dunn*, 2 *Bos. & Pull.* 247. *Doe v. Clark*, 5 *id.* 347. *Collier's case*, 6 *Coke*, 16. *Jackson v. Merrill*, 6 *Johns. R.* 192. The reason of this well established rule is, that unless the devisee on whom the personal charge is made, gets the fee, he may be deprived of the premises before the use remunerates him for the amount paid.

How can the contingencies to which the will had subjected the charge upon Henry and Isaac affect their right to the fee? I am of the opinion they cannot. The will gave to Henry and Isaac the house and lot in question, but subject to a charge that the rent should go and be applied by the executors of the testatrix for the maintenance, support and education of her two children, Thomas and Abigail; though the devisees were to have the free use of the garret or upper part of the house. It gave them, therefore, the present interest; they might be the landlords and rent the premises, or might occupy and pay the rent for the purposes contemplated by the will. They had a right to take and hold under the will, until the event happened which was to impose a personal obligation on them, to pay the charge directed by the will, to wit, the day that Abigail arrived to the age of twenty-one or married, or the day on which she died, if she died before she married or became twenty-one. They entered into the possession of the premises subject to have their rights and interests affected as these events might happen; and they held them, it appears, as they had a right to hold them, until Abigail arrived to the age of twenty-one and married. Having thus entered into possession and held under the will until the happening of these events, they became personally liable to pay the charge imposed upon them by the terms of the will, to wit, an

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equal part in value of what? not of a life estate, but of the "real estate"—the fee. And being subject to this personal charge, the case is within the rule to which I have referred, and the fee is cast upon these devisees by the operation of it, and consequently the other contingency that the testatrix had provided for in her will, to wit, the death of Abigail before she arrived at the age of twenty-one or married, could not happen, and therefore cannot affect the rights of the devisees. It is, therefore, unnecessary for us to consider what would have been the effect of her death previous to her marriage, and previous to the time she arrived at the age of twenty-one years.

The construction I have given the will, it appears to me, fully carries out the intention of the testatrix. But the construction contended for, that the will gave to Henry and Isaac only a life estate, most clearly defeats her intention; for Henry and Isaac, although they would obtain only a life estate, would be obliged to pay one half of the value of the real estate to Abigail and Thomas, having taken the estate under the will and having held it to the day of Abigail's marriage, and until she arrived at the age of twenty-one years; and Abigail and Thomas, after perhaps receiving one half the value, would still, together with William, or their representatives, be entitled to a portion of the remainder of the estate in fee, after the life estate of Henry and Isaac was carved out of it. Such surely could not have been the intentions of the testatrix. She could not have intended to require Henry and Isaac to pay one half of the value of her real estate for a life estate, and then have given the remainder in fee, mostly to the same individuals who were to receive the one half in value, thus giving them a double portion. Nor could she have intended that *William* should have any portion of her real estate, for she expressly says in the second clause of her will, that she bequeathed to him the sum of two pounds, as an acknowledgment *in lieu of his birth-right*. Thus it is evident the construction contended for must defeat the objects the testatrix had in view.

Again: it was insisted on the part of the plaintiff, that the will gave a *conditional fee* in expectancy on the part of



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Henry and Isaac, and that they were bound to show a performance of the condition. Had the estate devised been a conditional fee, they would undoubtedly have had to show a performance of the condition, by which the fee was to attach, if the lapse of time would not have raised a presumption of performance, and thrown the burden of proof on the opposite party to repel that presumption, as I think it would. But it is unnecessary to examine this point, as the case does not properly present it for our consideration, and as the fee most clearly was not a conditional fee. It is true, in the third clause of the will there was a condition imposed, but the condition was to impose a direct charge upon the premises for the rent, and did not impose a personal obligation on the devisees, on the neglect of the performance of which, the title was to be defeated; nor could any such inference be legally drawn from it. Its sole object was to secure the rent of the premises for certain purposes; but it did not work a forfeiture of the estate, if the rent was not paid. Nor does the sixth clause of the will imply any such condition; on the marriage of Abigail, or on her arriving at the age of twenty-one years, Henry and Isaac were required by the will to pay her and Thomas an equal share in cash; this was a personal obligation imposed upon them. But suppose they did not pay it; the devise does not say they shall forfeit the estate; they did not take the fee upon any such condition, and obligate themselves to pay one half the value of it—nor can it be inferred from the will that such was the intention of the testatrix, or that such would be the legal inference of the expressions used in the will. The charge was personal, and became a debt against them, and if they did not pay it, they might have been compelled to pay, and if they had not other effects, out of the lands devised. But their neglect to pay could work no forfeiture, and therefore the obligation imposed upon them to pay the amount with which they were charged, on their electing to take under the devise, constituted no condition on which they were to hold the fee. From the view, therefore, I have taken of the case, I have come to the

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conclusion that the judgment of the supreme court should be affirmed.

By Senator VERPLANCK. I have wavered a good deal in my view of this case during the very able argument of it ; but I have come to the conclusion that the judgment of the supreme court should be affirmed, as giving the more probable interpretation of the intention of the testatrix, as well as being most in accordance with the equity of the case.

The will is not only "inartificially drawn," (as is said in the opinion of the supreme court,) but of unusual obscurity and of some apparent contradiction ; still the intention of the testatrix, and the legal effect of her language I take to be briefly these :

I am of opinion that Henry and Isaac Thorne took under the will an absolute estate in fee simple, without any *condition*, in the legal sense of the word. The words "real estate," used in the will, and the charges upon the estate devised, make it an estate in fee simple, and not a life estate merely, as the absence of words of inheritance and limitation might otherwise have made it before our revised statutes. The condition "that the rents and profits of the house should, for a time, go and be applied to the executors," for the support of two of the children, taken in connection with the context, I regard as a charge upon the devisees, and not as the devise of a term to the executors. I consider also the payment directed to be made of certain proportions of the "value" of the lot devised to the other children, as being in like manner not a condition of a contingent estate, but a personal charge on the devisees, which, as said by Judge Bronson, "might be enforced as an equitable mortgage on the estate in their hands." I confess that this does not appear to me to be the necessary and exclusive legal interpretation of the will, for it might bear another ; but this seems the most probable, taking the instrument as a whole and regarding all the circumstances of the case. Nor have I any hesitation in saying, that additional weight is given in my mind to the probability, because it is in unison with the equity of the case, both in protecting the

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interests of *bona fide* purchasers against a long dormant claim, and coinciding with the strong legal presumption arising from the lapse of time, that the obligations of the devisees to make certain payments, whether these were to be considered as legal conditions necessary to the consummation or not, were duly discharged and the title thus perfected, under any technical construction whatever. This, however, is but a collateral consideration. I rest my opinion in favor of the affirmance of the judgment of the supreme court mainly upon the construction of the will first stated.

Upon the question being put, *Shall this judgment be reversed?* the members of the court UNANIMOUSLY answered in the negative. Whereupon the judgment of the supreme court was AFFIRMED.

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JENKINS vs. PELL

The affidavit accompanying a *warrant of distress for rent* is sufficient, in the statement of the time for which the rent accrued, if it be alleged that the amount claimed is for one quarter's rent due the first day of February last, in a case where, by the terms of the lease, a quarter's rent became due on the first day of February.

An avowry cannot be objected to for variance from the proof, where a *warrant of distress*, executed under seal, is set forth in the pleading without alleging it to have been so executed.

ERROR from the supreme court. *Jenkins* brought an action of *replevin* against *Pell*, in the New-York common pleas. The defendants avowed the taking of the goods in question for rent in arrear, setting forth the making of an affidavit of the amount of rent due, &c. and the delivery of a warrant of distress to a marshal of the city, by virtue whereof the goods were taken. The affidavit, made on the 26th April, 1834, was in these words: "City and county of New-York, ss. Ferris Pell, being duly sworn, says, that Thomas Jenkins is justly indebted to him in the sum of one hundred dollars, lawful money of the United States, for rent of certain premises, situated No. 77 Grand-street

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in the said city, for one quarter's rent due the first day of February last." The warrant of distress delivered to the marshal was in one of the avowries alleged to be a warrant of distress in writing ; in the other the allegation was merely that a warrant of distress was delivered to the marshal. On the trial of the cause it was admitted by the counsel for the plaintiff, that the plaintiff held the demised premises as the tenant of the defendant under the rent and payable at the time in the avowries mentioned. (The avowries stated that the plaintiff held under the yearly rent of \$400, payable quarterly, on the first day of August, November, February and May, by even and equal portions.) It was further admitted, that the sum of \$100 of the rent for the space of three months beginning on the first day of November 1833, and ending on the first day of February, 1834, was due and in arrear at the time of the distress. The warrant of distress produced on the trial was under seal. The counsel for the plaintiff raised two objections to a verdict for the defendant : 1. that there was a variance between the warrant, as described in the avowries and as produced in evidence ; the warrant produced being under seal, and the avowries containing no allegation that it was under seal ; and 2. that the affidavit did not conform to the requirements of the statute. The court of C. P. overruled the objections, and the jury, under its direction, found a verdict for the defendant, on which judgment was entered. The plaintiff having excepted to the decisions of the court, the record was removed into the supreme court, where the judgment of the C. P. was affirmed. See the opinion delivered in the supreme court, 17 Wendell, 418. The plaintiff sued out a writ of error removing the record into this court, where the case was argued by

C. O'Conner, for the plaintiff in error.

J. Law, for the defendant in error.

After advisement, the following opinions were delivered :

By the CHANCELLOR. There is no foundation whatever for the objection which was made in this case, that the warrant or

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power to distrain, produced on the trial, varied from that set forth in the avowry. Where the law requires an instrument to be under seal to authorize a particular remedy thereon, it is necessary, in pleading, to state the fact that it was under seal, either in terms or in other language from which the fact that it was under seal can be legally inferred. But where, as in this case, it was wholly immaterial whether the instrument was or was not under seal, an averment that it was in writing will be supported by the production of a written instrument either with or without a seal attached to the same.

The objection to the affidavit is one as to which there is more doubt. The defendant avowed the taking, &c. because the premises were leased at the yearly rent of \$400, payable quarterly, on the first of August, November, February and May, in equal proportions; that the plaintiff had occupied the premises for nine months ending on the 1st of February, 1834; that \$100 of the rent aforesaid, for the space of three months, *beginning on the first of November, 1833, and ending on the first of February, 1834*, was due and in arrear, whereof an affidavit was duly made, &c. pursuant to the statute, &c. The affidavit produced does not in terms state that the rent of \$100 for one quarter's rent *due* on the first of February, 1834, was for the quarter of a year which actually *ended* on that day, and as the statute requires that the affidavit should state *the time for which the rent accrued*, as well as the amount due, if it cannot be fairly implied from this affidavit that the rent was for the quarter ending on the first of February, as well as that it became due on that day, it is unquestionably a fatal variance. In that case it comes directly within the decision of the supreme court in *Marquissee v. Ormston*, 15 *Wendell*, 368, in which it was held that the affidavit was fatally defective in not stating the time for which the rent accrued, instead of the time when it became due. As this is a mere technical question upon the meaning of this affidavit, the jury having found the fact that the \$100 for which the distress warrant issued, was for a quarter's rent *for a quarter ending on the first of February*, and which was due and unpaid, I am disposed to concur in the

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construction put upon the affidavit by the court below, although the affidavit might have been technically true if the rent had been for a different quarter, but made payable on the first of February. I am inclined to think, with Mr. Justice *Bronson*, that an ordinary man, unversed in technical niceties, upon reading this affidavit would come to the conclusion, that the deponent meant to swear that there was \$100 due for the rent of the quarter *ending* on the first of February, 1834. I therefore am not prepared to say that the decision of the common pleas was erroneous; and shall accordingly vote to affirm the judgment of the supreme court which sustained that decision.

By Senator *DICKINSON*. The only question which I propose to discuss in this cause, is, whether the affidavit of the defendant in error which accompanied the warrant of distress was in compliance with the statute. The 8th section of the article of the statute entitled "of distress for rent," 2 R. S. 412, 2d ed. is as follows: "No officer shall proceed to make distress for rent, unless there be annexed to, or delivered with the warrant of distress an affidavit, made by the landlord for whose benefit the distress is to be made, or by his agent or receiver, before some officer authorized to administer oaths, specifying the amount of rent due, *and the time for which it accrued.*"

In the view I have taken of this cause, it is sufficient for my purpose that this provision of the statute is as clear and positive as can be framed from the English language, and in its general operation, is eminently calculated to shield the tenant from the unjust exactions of an oppressive and overreaching landlord.

But, if it is necessary to render a reason for the existence of the statute, and to establish its utility in detail, before we are permitted to acknowledge its force, I apprehend one of the many obvious reasons for enacting this section, may be found in the second section of the article referred to, which prohibits a distress for rent for which a *judgment shall have been recovered*. If, then, this affidavit is sufficient in a case where *two* quarters of rent are due, the landlord may recover judgment for the first

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quarter, and then distrain for one quarter's rent, not designating which; for both quarter's rent will be *due* in the language of the affidavit, and this done, he may then insist that his affidavit had relation to the first quarter's rent, and distrain for the second quarter with perfect impunity, and thus defeat this most express and salutary provision. I differ most essentially from the opinion of the supreme court, that "*this allegation fairly implies that the rent had accrued for the quarter of a year which immediately preceded the first day of February.*" The affidavit proves only that one quarter's rent of the premises, amounting to one hundred dollars, was *due* the first of February. But how long it had been due, and whether the rent had accrued for the quarter, or even for any portion of the year next preceding the making of the affidavit, or whether it was rent yet to accrue, but made payable in advance by the terms of the lease, is left entirely to conjecture; and the affidavit will as well apply to one case as the other. It does not either in form or substance state the *time for which the rent accrued*, and to sanction this careless neglect or wilful disregard of the statute, will open a wide door for fraud and oppression, and leave the tenant to the mercy or caprice of his landlord, unprotected by the salutary restraints which legislation has attempted to throw around him.

The affidavit should contain two allegations; the *amount* of the rent due, and the *time* for which it accrued. If the rent is honestly due, and the landlord has the right to distrain, this requirement of the statute is easily complied with, nor can there be any hardship imposed by insisting upon its strict observance.

The dominion of the landlord over his tenant, even in the subdued form tolerated rather than authorized by our statute, is sufficiently summary in its character to suit the spirit of the times, when confined to its legitimate boundaries. But to clothe him with implied powers, or rather, virtually leave him to uncontrolled discretion by casting down the only barrier which legislation has erected between rapacity and want, is more in accordance with the relations of the feudal than the present age. It is worse than vain for legislation to interpose the protecting forms

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of written law, if they may be rendered spiritless and nugatory by judicial repeals. If the statute means any thing, it means that the landlord (who it constitutes his own judge) shall make an affidavit stating the amount of rent due, the time when the term commenced for which the rent is claimed, and the time when it ended. Nothing more or less than this will or ought to satisfy the statute. This is its plain and common sense construction; nor can it be made to read otherwise, unless put to judicial torture.

Nor do I arrive at this conclusion in the absence of authority. In *Marquissee v. Ormston*, 15 *Wendell*, 368, Chief Justice Savage says: "*The affidavit should state the commencement as well as the termination of the time when the rent accrued.*" And he further justly adds: "Where there is no ambiguity in the language of a statute, the court have no right to understand it in any other sense than according to the plain import of the terms used by the legislature."

A great portion of our whole litigation arises from controversies growing out of the construction of our statutes, in attempting to change their popular and obvious import, and give them a meaning strained and artificial. This has infused into society a litigious spirit, which has blocked up and retarded the ordinary administration of justice, crowded our libraries with expensive but useless volumes, broken the constitutions of our judges, and impoverished the people. Nor will it ever find a satisfactory or successful termination until abandoned; but difficulties will increase as decisions are multiplied, and, in the end, clouds and darkness will be left to rest upon a science which claims for its highest attribute the perfection of reason.

I deem the principle to be decided in this case an important one, as well in its operation upon the laws of landlord and tenant, as its effect upon the construction of our statutes generally. The statute requiring the affidavit of the landlord as to the amount of the rent due, and the *time for which it accrued*, is not only positive in its requirement, but is calculated to be just and salutary in its operation, and ought not to be dispensed with. The affida-



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vit of the defendant in error is not in compliance with either its letter or its spirit ; and for this reason, in my opinion, the judgment of the supreme court ought to be reversed.

By Senator VERPLANCE. I have no hesitation in affirming the judgment in the court below. It was immaterial whether the warrant of distress was sealed or not. The description of the warrant, "as a warrant of distress in writing, duly executed, and in all things made conformable to law," was alike applicable to a warrant under seal and unsealed, and either of them was good in law. The fact of the seal had no bearing, either on the substance or the form of action ; it is therefore no variance.

The *affidavit* I think sufficiently clear. The statute says "the affidavit shall state the term for which the rent accrued." The object must be to give notice to the tenant, to prevent a subsequent distress for the same term, as well as recovery of rent for the same term by suit. But as the affidavit is or may be drawn by the landlord himself, it is not required to be expressed with technical precision, so as to exclude every possible meaning that under any circumstances other than those of the real case it might be made to bear. It must be certain to a common intent, and no more. Here, the landlord swore that the distress was for a quarter's rent due the first of February. The general usage of the city of New-York, would at once interpret this to mean, "rent for a quarter, that ended on the first of February." It might indeed be, that by a very special contract, the quarter's rent might be made payable on that day in *advance*. Such, however, is not the obvious nor probable meaning, nor unless a special contract was shown, the legal presumption ; for the statute in regard to leases in the city of New-York expressly recognizes the custom of the city, and provides, that when no special contract declares otherwise, the lease shall be deemed to be from May first to May first, payable at the expiration of each quarter on the usual quarter days. Here there was both an interpretation by usage and custom, and one by legal presumption, both giving a clear sense to the affidavit, agreeing with the actual

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fact. Had it been otherwise, and the distress made for rent due in advance, it should have been so set forth in full or the affidavit would be bad, because the words would convey a sense differing from the true state of facts. In this case, the affidavit answers all the purposes of the law.

On the question being put, *Shall this judgment be reversed?* the members of the court divided as follows :

*In the affirmative :* The PRESIDENT of the Senate, and Senators DICKINSON, LACY, LOOMIS, MAYNARD, MOSELEY, WILLES—7.

*In the negative :* The CHANCELLOR, and Senators J. BEARDSLEY, L. BEARDSLEY, BECKWITH, DOWNING, HULL, HUNTER, HUNTINGTON, JOHNSON, H. F. JONES, LEE, H. A. LIVINGSTON, SKINNER, SPRAKER, STERLING, VAN DYKE, VERPLANCK, WAGER—18.

Whereupon the judgment of the supreme court was AFFIRMED.

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VAN KLEECK, *appellant*, and the MINISTER, ELDERS AND DEACONS OF THE REFORMED PROTESTANT DUTCH CHURCH OF THE CITY OF NEW-YORK, and others, *respondents*.

Property specifically devised does not go into the *residuum* where the devise is by *law incapable* of taking ; in such case, as well as where a devise *lapses* by the death of the devisee, the property descends to the *heir at law* : and IT WAS ACCORDINGLY HELD, where by a will made in 1722, real estate was devised to a *religious corporation*, and the will contained a devise to *residuary devisees*, that though the devise to the corporation was void *ab initio* for the purpose of passing the estate, still it was operative as indicating the intent of the testator, and that the devise to the corporation showing the intention of the testator not to give the property to the *residuary devisees*, it did not pass to them, but descended to the *heir at law*.

At the common law, a *residuary devise* of real estate takes only what was intended for him at the time of the making of the will; not so as to a *residuary legatee* of personal estate. The latter takes not only what was *undisposed of* by the will, but also that which becomes *undisposed of* at the death of the testator by the *disappointment of his intention*. Whether the above distinction in reference to *real and personal property* is not abolished by the revised statutes, 2 R. S. 57, §5, *quære?*

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Where there is an absolute devise to a corporation, which by law is incapable of taking, nothing can be claimed by reason of such devise by a *residuary devisee* on the ground of a contingent interest given by the residuary clause, based upon the possibility of a reversion of the estate by the dissolution of the corporation, or by a forfeiture of its rights, in consequence of the non-performance of conditions.

To entitle a party to claim a *discovery*, he must show a perfect *prima facie* title in himself, before he can call upon the party in possession to disclose his title.

Where a testator devises all his interest in a *specific tract of land*, and then sets forth that partition had been made of the tract and certain lots assigned to him: *all which lots* he devises, &c.—whether, in construing the devise, the *first* or *second* description shall control, *quære*?

**APPEAL** from chancery. The appellant filed a bill of discovery relative to certain property in the city of New-York, in the possession of the Reformed Protestant Dutch Church of that city, and praying an account, &c.; he alleged that the church was an *incorporated body*, and was in possession of the property in question, under a devise contained in the will of *John Harberdinck*, bearing date 23d April, 1722; which devise he averred to be *void*, on account of the incapacity of the church to take real estate by devise; and that by a *residuary clause* in the will, the property in question was given to four persons or the children of those persons, one of whom was the ancestor of the appellant, and under whom he derived title to two-fifths of the share devised to him. The appellant set forth the will, by which the testator, after declaring his intention to dispose of his temporal estate, and giving certain specific legacies to remote relatives of his own residing in Holland and a small sum to the son of a kinsman residing in the city of New-York, devised unto the Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the city of New-York, and to their successors, forever, “*all that my (testator's) right, title, interest and property in and to an equal fifth part, share and proportion of all that tract or parcel of land, situate lying and being upon Manhattan's Island, within the city of New-York, called or known by the name of Shoemaker's field or land, on the northeast side of Maiden's Lane or path, which leads unto a certain street called Queen-street; the which said tract or parcel of land contains by estimation about sixteen acres, and by mutual consent, agree-*

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ment and approbation of all the proprietors and part owners therein concerned, some years past was surveyed and laid out into 164 lots, with convenient streets and lanes to accommodate the same, as may fully and amply appear by a certain instrument of indenture, with the map or chart thereunto annexed, under the hands and seals of all the proprietors and part owners, viz. (naming five persons, including the testator,) as by the said indenture with the chart or map bearing date 14th September, 1696, relation being thereunto had more fully and at large doth and may appear. By which indenture, with the chart or map thereunto annexed, it is declared and agreed, that the said John Harberdinck's *proprietie*, share and dividend in the said 164 general lots, which be and consist in five and thirty lots, described, *markt* and numbered, viz. one, &c. (enumerating the lots assigned to him) lying and being, butted bounded and containing in length and breadth *as* by the said indenture with the map or chart amply and largely is described, mentioned and expressed; together with four other lots, &c. (describing them) *all which several and respective lots, pieces and parcels of land*, I, the said testator, do hereby give, devise and bequeath unto the said Minister, Elders and Deacons of the Reformed Protestant Dutch Church of the city of New-York, and to their lawful successors forever. To HAVE AND TO HOLD, all the aforesaid several and respective lots, pieces and parcels of land unto the said Minister, &c. and their lawful successors forever, to be received and employed by the said Minister, &c. *immediately after my decease, and the decease of my wife, Mayken Harberdinck*, for the payment of the yearly stipend, salary or maintenance of the respective minister or ministers which from time to time and at all times hereafter, shall be duly and legally called to the *ministrie* of the said church, and to no other use or uses whatsoever." Then came the following clause: "And I, the said John Harberdinck, do further give, devise and bequeath unto my said wife, Mayken Harberdinck, *all the rest* of my temporal estate, real and personal, none excepted, whether the same shall be and consist in houses, lands, goods, chattels, gold, silver, moneys, negroes, bonds, mortgages, bills, book debts, or any

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other effects or estate whatsoever, none in the world excepted. To Have and to Hold *all the rest* and remaining part of my estate, *except what part as above is bequeathed and disposed*, unto my said wife, Mayken Harberdinck, during her natural life ; and after her decease, I give, devise and bequeath one just and equal quarter part *thereof* unto my wife's sister, Jannatie Boss, to be equally divided between her children ; one other just and equal quarter thereof I give, devise and bequeath unto all the children of *Baltis Van Kleeck*, late of Dutchess county, deceased, to be equally divided between them, and to their heirs and assigns, forever." The two other quarters of the estate were disposed of in like manner to other persons. The testator died previous to 7th February, 1723. The appellant deduced title to the premises in question under the devise to the children of *Baltis Van Kleeck*.

The appellant further stated in his bill that the testator, notwithstanding the *partition* set forth in his will, *continued seized in fee simple*, as tenant in common with the four other persons, between whom and himself partition had been made as stated in his will, in and to an undivided fifth part of a *certain piece of land left undivided* by the proprietors of the Shoemaker's field, lying between the streets now called Nassau and William, and Fulton and John, being about 200 feet in length, and about 100 in width, and *designated* on the map or chart annexed to the indenture of partition (referred to in the will) *as not divided* among the proprietors of the tract called *Shoemaker's field*.

He further stated, that the Reformed Protestant Dutch Church were *incorporated* by letters patent under the great seal of the colony of New-York, on the 11th May, 1696, whereby a church then erected and certain real estate were granted and confirmed unto the corporation, who were further authorized to purchase and hold other lands, over and above those thereby settled on the corporation, *not exceeding the yearly value of £200*, current money of the province. The appellant averred that the *yearly value* of the lots in the *Shoemaker's field*, claimed and possessed by the corporation under *John Harberdinck*, greatly exceeded

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£200, at the time of the death of the testator, and at the time when the corporation took possession of the property and entered into the receipt of the rents, issues and profits thereof; and although the capacity of the corporation to take and hold real estate had from time to time been enlarged by statutes passed for that purpose; yet the appellant charged that the yearly value of the lands holden under the will of Harberdinck has in each year greatly exceeded the amount which the corporation were by law authorized to take and hold, specifying the amounts received between certain periods, and that at the filing of the bill they were of the yearly value of \$30,000.

The appellant averred that in two ejectment suits commenced by him as the heir at law of one of the children of Baltis Van Kleeck, for the recovery of a part of the premises possessed by the corporation, he had been nonsuited for the want of sufficient proof; the officers of the corporation refusing to be sworn or to furnish him with the evidence in their possession necessary to the maintenance of the suits. He then prayed for a discovery, an account, and for general relief.

The respondents put in a *demurrer* to the bill, which, after argument, was allowed by the chancellor, and the bill dismissed with costs. *See the opinion delivered by the chancellor, 6 Paige's Ch. R. 606 et seq.* Whereupon the case was removed into this court by appeal. The cause was argued here by

*L. H. Palmer & B. F. Butler*, for the appellant.

*D. Lord, jun. & G. Wood*, for the respondents.

*Points on the part of the appellant:*

I. The attempted devise to the church was wholly illegal; the *act* and *intention* were both absolutely void *ab initio*, and as the land described in this void devise was not *effectually* disposed of, it constituted a part of the *residuum* of the estate, and passed to the residuary devisees. *Doe, ex dem. Ferguson, v. Roe*, 1 *Harrington*, 256, 258. *Denn v. Taylor*, 2 *Chit.* 681. 18 *Com. Law R.* 457. *Doe v. Sheffield*, 13 *East.* *Goodwright*

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*v. The Marquis of Devonshire*, 2 Bos. & Pul. 600. *Lydott v. Willows*, 3 Mod. 229. *Countess of Bridgewater v. Duke of Bolton*, 6 id. 111. *Bennett v. French*, Leon. 551. 8 Vin. Abr. 47, No. 9. Id. 368, U. c. Id. 371, W. c. Id. 444, No. 1, C. c. 14 id. tit. Intent, 450. 7 Johas. Ch. R. 264 to 273. *Doe v. Pedley*, 1 Mees & Wels. 670. *Stevens v. Hide*, Cas. Temp. Talb. 29. *Sherwood and Noon's case*, 1 Leon, 250. *Crane v. Crane*, 2 Root, 487. *Brown v. Higgs*, 4 Ves. 716. *Munday v. Munday*, Cas. Temp. Hard. 143. *Dunage v. White, Jac. & Walk. Tregonville v. Tregonville*, 3 Dow's Parl. R. 206. *Cruise v. Barley*, 3 P. Wms. 20. *Morgan v. Surman*, 1 Taunton, 289. 3 Maule & Selw. 300. 14 East, 372. 6 Dow's Parl. R. 35. 1 Harrington, 256. *Hayden v. Stouten*, 5 Pick. 528. *Brigham v. Shattuck*, 10 id. 309. *Mayor v. Gowland, Dickins* 563. *Goodtitle v. Knot*, 5 Moore & Payne, 682. Cowp. 44. *Hall v. Mullen*, 5 Har. & John. 194. *Doe v. Bartle*, 1 Dowl. & Ryl. 81. *Jones v. Mitchell*, 2 Sim. & Stu. 293. *Theall v. Theall*, 7 Lou. R. 230. *Lessee of Cheeseman v. West*, 1 Yeates, 413. *Lillibridge v. Adie*, 1 Mason, 234. *Sloan v. Hayle, Rawle*, 28. *Crooke v. De Vandes*, 9 Ves. 205. *Greene v. Stevens*, 17 id. 76. 2 Bulstrode, 180. *Bacon v. Hall, Cro. Eliz.* 497. Id. 422. *Doe v. Weatherby*, 11 East. *Doe v. Langdon*, 14 id. Code Napoleon, b. 3, p. 275, tit. 11, Donations by Wills, § 3; Heirs and Legacies, No. 1002, § 4; General Legacy, No. 1003, 1004, 1005, 1006, 1009, 1011, 1012. Digest Civil Law in New-Orleans, ch. 6, § 3, 232; art. 110, § 4, 234; art. 120, 121. *Doe v. Underdown, Willes*, 276. *Perkins*, 566. *Wright v. Horne*, 8 Mod. 223. *Ree v. Flood, Fortes*, 184. *Goodwright v. Opie*, 8 Mod. 123. *Crooke v. De Vandes, Willes*, 305. 11 Ves. 332. *Cole v. Clairbourne*, 1 Wash. 285. *Peay v. Barbour*, 1 Hill's S. C. R. 97. *Hyle v. Hyle*, 3 Mod. 228. *Goodwright v. Wright*, 12 id. 287. *Goore v. Goore*, 9 id.. Cov. & Hughes' Dig. 512. *Wiseman v. Baldwin, Owen*, 112. *Perkins*, 566. *Brownl. & Goldsb.* 246, *Fleming J. Bulstrode*, 292. *Hutton v. Simpson*, 2 Ves. 722. *Doe v. Kit*, 4 T. R. 603. *Warner v. White, Doug.* 339. *Hogson v. Ambrose*, id. 341.

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*White v. White*, cited 6 T. R. 518. *Cro. Eliz.* 422, pt. 20. *Ward's case*, per Dyer J. Plowden, 414. *Cambridge v. Rouse*, 8 Ves. 25. *Roe v. Wickett*, Willes, 305. *Maxwell v. Call*, 1 Bro. C. C. R. 889.

1. By the common law, as settled by the English decisions at the American revolution, the residuary legatee takes in preference to the next of kin, all legacies and bequests which become lapsed by events subsequent to the making of the will as well as those which were originally void.

2. In residuary devises of *land*, or of moneys regarded as land, whether to a party for his own benefit, or as trustee, the common law, as settled at the revolution, gave the estate or money to the *heir* in all cases of lapsed devises, or lapsed charges on the fund.

3. This preference of the heir to the *residuary legatee*, in all cases of land, and of uses springing out of land, was founded, not in reason, but on the policy of the feudal system, and of the English constitution, and is not applicable here; though being firmly settled in England, as a part of the common law, it must be received and acted on with us until altered by the legislature.

4. There is a distinction between a devise void, *ab initio*, and one that becomes void by the subsequent death of the devisee, or by any other subsequent event. In the former case, the land attempted to be devised, sinks into the *residium*, and goes to the residuary devisees; in the latter, it goes to the heir at law. This distinction was taken in *Bennett v. French*, decided prior to 1589; was several times recognized between that time and the revolution, and has never been denied or questioned in any English case; on the contrary, the weight of English authority, both before and since the revolution, is decidedly in its favor.

5. It is not inconsistent with this distinction, that where lands are devised to the heir himself, charged with the payment of legacies and debts, a void as well a lapsed legacy should fall into the estate for the benefit of the *heir*: nor that a similar result should take place where lands are devised to trustees, and directed to be sold for the payment of legacies and debts, and one of the



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legacies is either void or lapsed. *Jackson v. Harlock, Ambler*, 487. *Collins v. Wakeman*, 2 *Ves. jun.* 683. *Rashley v. Masters*, 1 *Ves.* 201, 202. *Grovner v. Hallum*, 2 *Blunt's Ambler*, 643. *Arnold v. Chapman*, 1 *Ves. sen.* *Kennel v. Abbot*, 1 *Sim. & Stuart*, 296. 4 *Ves.* 802.

6. Nor is it inconsistent with this distinction that the heir, and not the residuary devisee should take where there is a devise to the heir, of land to which he is entitled by descent. *Hutchinson v. Hammon*, per *Buller*, J. 3 *Bro. C. C.* 143. *Kennon v. Mc Roberts*, 1 *Wash.* 109, in connection with *Cole v. Clayborne*, *id.* 265. *Smith v. Saunders*, *W. Black.* 736. *Newkerk v. Newkerk*, 2 *Caines*, 345. *Cowp.* 420. 8 *Petersdorf*, 132. *Robinson v. Knight*, 2 *Eden*, 155. *Ellis v. Smith* 1 *Ves.* 17. *Jackson v. Harlock, Ambler*, 487.

7. The distinction above stated is founded in good sense. Where the devise is void, it is not to be regarded as any part of the will, but the will should be construed, as if the void devise were stricken out. In such case, the land described in it, will of course sink into the general bulk of the estate, and go to the residuary devisee if there be one.

8. The two American cases cited by the chancellor, in which it has been held, that a devise void *ab initio* did not fall into the residuum, but descended, as in the case of a lapsed devise to the heir at law, were decided without reference to the above-mentioned distinction; are not binding on the courts of this state, and especially on this court; and are moreover contrary to the English decisions, and to other American cases of higher authority.

9. If no authoritative decision on this point has been made by the courts of this state, we must take the English adjudged cases as evidence of the common law. Those cases, as above stated, are in favor of the distinction referred to, which should the more readily be adopted by the American courts, as there is here no good reason for extending any peculiar immunity to the heirs at law. *Jackson v. Harlock, Ambler*, 487. *Grosvenor v. Hallam*, *id.* 643. *Newell v. Newell*, 12 *Price*, 300. *Slade v. Slade*.

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2 *Vern.* 624. *Bert v. Rigdon*, 1 *Plowd.* 340. 1 *P. Wms.* 307.  
1 *Stange*, 25.

II. Notwithstanding the testator's attempt to devise the land to the church, and admitting that he actually intended that the residuary devisees should take nothing which he had attempted to give the church, there yet remained in legal contemplation a residuary and contingent interest, founded on the condition annexed by law to every devise of this sort, that the land may revert by the dissolution of the corporation, or by breach of the condition on which the devise is made. This reversionary and contingent interest was a proper subject of devise, consistently with the declared intent of the testator; and even had the devise been valid, would have gone to the residuary devisees. The descent to the heir was thus broken; and the actual devise of the reversionary and contingent interest to the residuary devisees, drew along with it (the devise to the church being void) the whole estate, according to the well settled distinction in the English cases, which is recognised and assented to by his honor the chancellor, in his opinion in this case. 2 *Black. Comm.* 175. *Angel on Corp.* 105, § 2. *Co. Litt.* 13, b. 1 *Black. Comm.* 484. 2 *id.* 256. *Trustees of Dartmouth College v. Woodward*, 4 *Wheaton*, 518. *Case of Sutton's Hospital*, 10 *Coke*, 24, 33. *Alleyn*, 28. 1 *Freeman*, 519. 2 *Cowp.* 808. 2 *Bos. & Pull.* 600. 1 *H. Black.* 30. 3 *T. R.* 88. *Right of Visitation*, 1 *Wash.* 262. *Phelps v. Berry*, per *Ld. Holt*, *Skinner*, 447, 483, 484. *Eden v. Foster*, 2 *P. Wms.* 325, 426. 15 *Pick.* 538. 10 *id.* 309. *Willes*, 296. 1 *Ves.* 420. 3 *Maule & Sel.* 300. *Fortes.* 84. *Salkeld*, 229. 11 *Mod.* 61. 2 *Vernon*, 394. 1 *H. Black.* 30. *Co. Litt.* 215, a. 251, a, b. *Litt.* § 415. *Black. Comm.* 158. *Doe. v. Scott*, 3 *Maule & Sel.* 306. *Willes*, 296, 300. *Avelyn v. Ward*, 1 *Vesey*, 420. *Sprig v. Sprig*, 2 *Vernon* 394. 6 *Halst. R.* 224. *Paige v. Haywood*, 11 *Mod.* 61.

III. The situation of the testator's family; the intention to dispose of all his property, expressed in the preamble and conclusion of his will; and the singularly by comprehensive words of the residuary devise, leave no doubt that he actually and fully intended that all his property, not otherwise *effectually* disposed

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of, should go, whether known to him or not, to his residuary devisees. They, and not his heir at law, were the special objects of his bounty. Even admitting that this case stands on the same ground as a *lapsed* devise, still there is a plain intent that the heir at law shall not take, which even in the case of a *lapsed* devise is sufficient to carry the estate to the residuary devisee. *Wilse v. Wilse*, 5 *Moore & Payne*, *Beachcraft v. Beachcraft*, 2 *Vern.* 690. *Munday v. Munday*, *Cas. Temp. Hardw.* 143. *Morgan v. Suerman*, 1 *Taunt.* 289. *Frogmorton v. Halliday* 1 *Wm. Black.* *Putnam v. Stevens*, 15 *East*, 505. *Kennon v. McRoberts*, 1 *Wash.* 107, 108, 109; *Rule*, p. 104, 105. *Smith v. Sanders*, 2 *Wm. Black.* *R.* 736. *Smith v. Triggs*, 1 *Stra.* 487. 2 *Vern.* 690. *Cole v. Clarebourn*, 1 *Wash.* *Strong v. Treat*, 1 *Wm. Black.* *R.* 200. *Robison v. Knight*, 2 *Eden*, 155. *Doe v. Alpen*, 4 *T. R.* 87. 6 *Mod.* 111. 10 *id.* 371. 3 *id.* 229. 2 *Vern.* 690. 5 *Harr. & Johns.* 190. *Sherwood & Nones' case*, 1 *Leon.* 250. 2 *Root*, 487. *Brown v. Higgs*, 4 *Ves.* 716.

IV. Supposing the residuary devisees not entitled to the land attempted to be devised to the church, yet the demurrer should have been overruled.

1. The church is in the possession of an undivided share in Shoemaker's field, claiming it under the will of the testator, which is not contained in the attempted devise to it, but which was intentionally and expressly devised to the residuary devisees.

2. The complainant, as a representative of the residuary devisees is entitled to the inspection and use of the will for the purpose of having it proved and established, especially as against a volunteer who has the will in his possession.

3. The complainant was entitled to the discovery prayed for, to enable him to prosecute his suit at law against the church. *Suffolk v. Green*, 1 *Atk.* 451. *Bishop of Sodor and Man v. Earl of Derby*, 2 *Ves.* 357. *Attorney Gen. v. Brown*, 1 *Swanst.* 304, n. b. 1 *Har. Ch. Pr.* 294. 2 *Madd. Ch.* 283.

*Points on the part of the respondents :*

I. Supposing the devise to the church to be void, the residuary devisees cannot take the land so devised ; because,

1. In devises of real property, the intent is to pass nothing by the residuary clause, which the antecedent clauses of the will purport to grant to others. A devise of land operates upon and refers only to real estate *then* belonging to the devisor; and all devises of land, as well residuary devises as others, are specific. In both these respects a residuary devise of land differs from a residuary bequest of personalty. *Howe v. Earl of Dartmouth*, 7 Vesey, jun. 147. *Smith v. Saunders*, 2 W. Black. 736; *Cowper*, 420, *S. C. Grosvenor v. Hallam*, 2 Ambler, 645, *Blunt's ed.* 4 Mass. R. 154. 2 *Powell on Devises*, ch. 5, *Jarman's ed.*

2. As well in the case of an antecedent devise, which is inoperative by reason either of the illegality of the devise or of the previous death of the devisee, as in the case of an antecedent devise which lapses, the will purports to give to the devisee the subject devised. The intent of the testator is to exclude all such devises from the operation of the residuary clause.

3. The intent thus to exclude from the residuary clause is as strong in the case of an *illegal devise* as of a *lapsed devise*; the latter is as inoperative as the former, inasmuch as the will is ambulatory and entirely inoperative until the death of the testator. Therefore, the decisions in favor of excluding from the operation of the residuary devise, lands embraced in antecedent devises in case of lapse are equally authorities to exclude lands embraced in devises *de facto* which are illegal. Cases of lapsed devises: *Doe v. Underdown*, *Willes*, 293. *Amerbury v. Brown*, cited by Grey, Chief Justice, in 2 Black. R. 739. *Wright v. Horne*, (also cited as *Wright v. Hall*,) 8 Mod. 122; *Fortes* 182, S. C.; *Willes*, 299 S. C. *Roe v. Flood*, 1 Fortes. 182. *Aveylyn v. Ward*, 1 Vesey, sen. 420. *Smith v. Saunders*, 2 W. Black. 736.

4. In the case of illegal devises the intent of the testator failing, and it being inadmissible to conjecture what would have been his disposition of the devised land had he known of the failure, it descends to the heir at law, who is not to be disinherited, unless by plain words or clear implication. *Denn v. Gaskin*,

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*Cowper*, 266. *Prec. in Ch.* 473. *Tregonell v. Sydenham*, 3 *Dow*, 210. *Schauber v. Jackson*, 7 *Cowen*, 187; 2 *Wendell*, 13 *S. C. in error*. *Grosvenor v. Hallam*, 2 *Ambler*, 645, *Blunt's ed.* 2 *W. Black.* 736.

5. Although an illegal devise of particular lands shows an intent to exclude the *heir*, it also shows an intent to exclude the *residuary devisee* from taking it. The intent failing, the heir takes, not simply by force of the intent, but by the rule of law. *Cases as last cited.*

6. The weight of authority is in favor of excluding all cases of inoperative antecedent devises from the residuary clause. 1. Cases of lapsed devises, *supra.* 2. Cases of void devises: *Amesbury v. Brown*, cited in 2 *W. Black.* 737. *Goodright v. Opie*, 8 *Mod.* 123. *Willes*, 299. *Collins v. Wakeman*, 2 *Vesey*, *just.* 683. 3. Cases of conditional devises: *Newkerk v. Newkerk*, 2 *Caines*, 345. *Roe v. Flood*, 1 *Fortes.* 184. *Doe v. Scott*, 3 *Maule & Selw.* 300. *Hayden v. Stoughton*, 5 *Pick.* 530. 4. Cases in which the heir takes illegal charges for charities: *Arnold v. Chapman*, 1 *Vesey, sen.* 108. *Grosvenor v. Hallam*, 2 *Ambler*, 645. *Durour v. Matteux*, 1 *Vesey, sen.* 321; 1 *Sim. & Stu.* 292, *S. C. Jones v. Mitchell*, *id.* 290. 5. Cases of illegal devises: *Tregonwell v. Sydenham*, 3 *Dow*, 200. *Green v. Dennis*, 6 *Conn. R.* 293. *Lingan v. Carroll*, 3 *Har. & McHen.* 333. *James v. James*, 4 *Paige*, 115. See also 2 *Powell on Devises*, *ch.* 3 and 5, *Jarman's ed. cited in Law Lib. vol. 5, N. S.*

7. In the present will, the peculiar language of the residuary clause shows an express intent to exclude from it all the real estate which the will antecedently purports to devise, whether legally and effectually devised or not.

II. Supposing the devise to the church to be valid, the residuary devisee cannot take; because,

1. There is no actual or valid condition attached to the devise, *Newkerk v. Newkerk*, 2 *Caines*, 345; *Co. Litt.* 223; *Bradley v. Pricetto*, 3 *Vesey, jun.* 324; and if there were, none but the heir could take advantage of it.

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2. If there be a condition, it cannot operate so as to create a legal and valid conditional limitation of the lands in question, to the residuary devisees.

After advisement, the following opinions were delivered:

By Chief Justice NELSON. It is admitted, for the purposes of this decision, that the devise to the church is void; that body being incapable, as the law stood at the time, of taking or holding real property by devise. And this presents the most material question involved in the case, viz: whether the premises thus ineffectually disposed of to the church passed to the *residuary devisees*, under the clause of the will in their favor, or descended to the heirs at law.

The intent of the testator is always the leading enquiry, when searching after the meaning of the whole or of any particular clause of his will; and no person can claim any interest or office under it, unless he can, from the language employed, raise an intent, express or implied, to give him such interest. The heir takes independently of the will—the *devisee* only by virtue of its provisions. It is a fundamental rule, also, that an heir at law shall not be disinherited, unless there are express words or a strong implication to that effect; because, as is said, the title of the heir is founded on the laws of descent, which are certain, and is therefore not to be defeated by an uncertain devise. And further: if the estate is not effectually given to some other person or body, the heir takes it, because, however strong the language of the will and intent of the testator may be to cut him off, it is not enough; there must be an operative gift of the estate away from him. These are familiar general rules in respect to the construction of wills which have a bearing upon the particular question before us; but there are one or two others which I will advert to, relating directly to the interpretation of the *residuary clause*.

The effect of the residuary clause has frequently come under the consideration of the courts in respect to contingent and remote reversionary interests existing in the deviser at the date of his will,

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which he had not previously disposed of by any words, and which therefore remained fit subject matter for the sweeping residuary provision to act upon. The question has usually arisen between the *heir* and the *residuary devisee*, the former insisting that the interest claimed was not included in that clause. The leading case is *Strong v. Fealt*, 2 Burr, 910, in which the court lay down the rule, that the generality of the expression used in the residuary clause, if unrestrained and unqualified by other words, would carry all the testator's estate in possession, reversion or remainder, but that these general words may be restrained by others, either expressly, or as clearly and plainly to be collected from the will; or, as perhaps better expressed by Lord Tenterden, Ch. J. in *Doe v. Fosseck*, 1 Barn. & Adol. 186, where he says: "I take the general rule of construction to be that all the testator has, which is not otherwise disposed of, passes under a residuary clause, unless there appear from other parts of the will when the whole is read, a clear and manifest intention that something should not pass." He further observes, "that it is not necessary that the testator should have a particular property or interest *in his contemplation* when framing the residuary clause; the question is, what intention appears on the whole, and the property will pass, unless it can be shown that the testator distinctly intended otherwise." This brings us directly to the application of these rules to the will under consideration.

It must be admitted that the residuary clause, copious as is the language of conveyancing, could not very well be made more comprehensive; and of course operates upon every interest or estate that the testator had at the time, and from which it is not restrained by his manifest intent, as indicated by other portions of his will. For the *respondents* it is insisted such intent, in respect to the premises in question, is indicated by the previous disposition to the church—that that act of the mind is irreconcilable with the idea of an intent at the same time to give the premises to the residuary devisees—that the first is plainly expressed, the devise being in terms to the church, and that the

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court therefore cannot by construction raise another for the benefit of the residuary devisees contradictory to it. I was strongly impressed with the force of this view on the argument, and did not then and do not now perceive how it can successfully be met, unless it is by calling in aid some principle of law that will justify us in obliterating from the will this devise, so that it may be disregarded in searching for the intent of the testator; then scope would be given to the general words to operate, and carry the estate over to the residuary devisees. It is admitted for all purposes of *passing* the property to the church, this clause is as ineffectual as if it was out of the will, and has thus failed to further the object for which it was inserted: so far confessedly it is mere blank paper. But is there any principle that will authorize us to *reject* the words when searching through the will to ascertain the meaning of other provisions and expressions? None was referred to on the argument, and after a diligent examination, I have been unable to find any. Indeed the contrary rule seems to be well settled; namely, that a testator is in general supposed to calculate upon his dispositions taking effect, and not to provide for the happening of events which will defeat them as the death of devisees, legatees, &c. The whole doctrine of *lapse* stands upon this principle. 2 *Atk.* 375. 2 *Powell*, 11 *Jarman's ed.*

Besides, no rule is better settled, or founded in more obvious sense, than the one which requires that all parts of a will are to be construed in relation to each other. General words in one part may be restrained by subsequent words, and shall be construed so as not to defeat the intention of the testator, to be collected from any other part of the will. 1 *Burr.* 38. 4 *T. R.* 82. 8 *id.* 5. *Powell*, 6. I might also refer to a considerable class of cases, the principle of which has not been doubted, though there is some confusion arising out of its application, where a devise of real property is made after first directing a sum of money to be taken out *for the benefit of a charity*, which is void, and where such money partaking of the nature of the property out of which it is to be raised, has been adjudged to descend as an undisposed interest in the real estate to the heir, instead of sinking into the



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inheritance and passing to the devisee. *Grosvenor v. Hallam, Ambler*, 643, is one of this class, and *Blond v. Wilkins*, cited 1 *Bro. Ch. Cas.* 61. Others will be referred to hereafter, upon a closer view of the case. Now in all this class of cases, it will be perceived that the void provision in respect to the charities must have been *regarded* by the court, and not only so, but a most important effect given to the words. If the clause had been considered as obliterated, as insisted upon here, the devisee of the estate out of which the sum of money was to be raised, would have taken it disencumbered of the charge—no words would have been left by which the court could have fastened it upon the devised premises. But instead of this, the provision, though ineffectual to carry the fund to the object of the testator's bounty, is considered as clearly indicating an intent to take it out of the estate devised, and hence not to give it to the devisee ; and thus the fund failing to the purpose of the testator, and not being otherwise disposed of, descends by force of law to the heir. I cannot doubt, therefore, that we are bound to read this clause in expounding the will ; and that though altogether ineffectual to pass the property to the church, it must be taken into our consideration the same as any other words, for the purpose of assisting in collecting the meaning of the testator in respect to other dispositions. Looking then at the words of the clause devising the property to the church under the most favorable rules of construction respecting the generality of the expression of the residuary clause, do they not evince a clear intent to except the premises from it ? The testator thereby contemplated giving them not to the residuary devisees, but to the church—to the “Minister, Elders and Deacons,” and “their successors forever ;” and assuming, as I have shewn, that he is supposed to calculate upon his dispositions taking effect, it seems to me difficult to conceive of a stronger negative clause against a disposition to any other devisees.

The case was very ably argued by the respective counsel, both on principle and authority, and it was made very manifest that the adjudged cases, as well as the *dicta* of learned judges, are singularly contradictory on the point. For this reason I have

recurred to first principles, the only sure process by which to test the soundness or unsoundness of conflicting cases. But even the number and weight of the authorities, I think, are in accordance with these principles. *Grosvenor v. Hallam, Ambler*, 643, has been considered a leading case, and always referred to on the point. There the testator devised to his executors and their heirs a messuage, subject to the payment of the annual sum of £10, which he gave to charitable uses; and he gave the residue of his real estate in trust, to be sold, directing the moneys arising therefrom, together with his personal estate, to be distributed as therein specified. The £10 annuity for charitable uses was void, and the question presented was, whether it belonged to the heir, or the residuary devisee. The fund was regarded as real estate, and there was no question but the residuary clause was comprehensive enough to embrace it. It is, therefore, impossible to distinguish it in principle from the case before us. Lord Camden held, that the heir was entitled. The rule as to real estate is, he said that where the intention of the testator is to devise the residue exclusive of the part given away, the residuary devisees shall not take that part in any event. He considered the rent charge of the £10 severed forever from the devise to the residuary legatees. The doctrine of this case was recognized by Lord Eldon, in *Tregonwell v. Sydenham*, 3 *Dow's Parl. Cas.* 212. *Baker v. Hall*, 12 *Ves.* 496, is also a clear authority for this principle. There the testator gave to a minister or clergyman of a certain parish forever, an annuity or rent charge, of £35, to be issuing out of a certain messuage, &c. for charitable purposes; he then devised the same (subject to said annuity) upon certain trusts; and devised all the residue of his real and personal estate, not therein before disposed of, upon other trusts, &c. The question was, whether the annuity, the devise of which was void, went to the residuary devisee, or to the specific devisee. Sir William Grant, the master of the rolls, said, that the testator appeared to have expressly excepted the annuity out of the residue of his estates, and could never have had it in contemplation that it should go in any event to the residuary devisee. It is true he held that it sunk for the benefit of the specific devisee;

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whereas, according to *Grosvenor v. Hallam*, it should have gone to the heir. The heir, however, was not before the court, and his right does not seem to have been noticed. But so far as the principle is concerned, in the case before us, it is a clear authority against the residuary devisee ; because it directly decides, that a void devise of an interest in real estate is so far effectual as to evince an intent to take it out of the sweeping residuary clause, as much so as if it had been in every other respect valid. The case of *Gibbs v. Ramsey*, 2 Ves. & Bea. 294, decided also by Sir William Grant, about 14 years after *Baker v. Hall* was decided, is as follows : The testatrix devised her real and personal estate to trustees, upon trust to sell, and out of the money she bequeathed certain charitable legacies, which were void. She then bequeathed the residue of *the moneys arising from the sale*, and all the residue of her personal estate, &c. The master of the rolls said it was clear that such part of the real estate as is given to charitable purposes belongs to the heir at law, and does not go either to the next of kin, or the residuary legatee. It will be seen that there could be no question here but that the residuary clause was comprehensive enough to embrace the fund bequeathed to the charitable uses ; because it included in express terms the rest and residue of the moneys arising from the sale of the real as well as personal estates. The case of *Jones v. Mitchel*, 1 Sim. & Stu. 290, decided by Sir John Leach, master of the rolls, in 1823, is also directly to the point. The testatrix devised her real estate, after certain limitations, to trustees, in trust, to be sold, and out of the moneys produced by the sale to pay certain legacies, and then a legacy of £800 to charities, and the residue to R. The master of the rolls held that the void legacy of £800 belonged to the heir, on the principle that the residuary devisee of real estate, or of the price of real estate, could take nothing but what was at the time intended for him. His words are worth transcribing, as distinctly marking the principle upon which I have supposed the case before us must turn. He observes, that the will as to *personal estate*, speaks at the time of the death of the testator, and the *residuary legatee* takes not only what is undisposed of by the expressions of the will, but that which becomes undisposed

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of at the death by disappointment of the intention of the will ; it is otherwise as to the residuary devisee of *real estate*, or of the price of real estate, as to him the will speaks only at the time of making it, and he can take nothing but what is *at that time intended for him*. The master of the rolls seems to have had in his mind the words of Lord King, in delivering his opinion in *Wright v. Hall*, a century before, and which are approved by Chief Justice Willes, in *Doe v. Underdown*, *Willes*, 299. He there said, speaking of a devise of real estate, that though the will was not complete until the death of the testator, so as to vest any thing in the devisee, yet that the intent of the testator is to be taken to be, as things stood at the time of making his will, for he makes it as if he meant to die that moment. The same view will be found in the case of *Smith v. Saunders*, 2 *Black. R.* 739, and in *Amesbury v. Brown*, there cited. The principle is also distinctly admitted by Lord Eldon, in *Tregonwell v. Sydenham*, 3 *Dow's Parl. Cas.* 194, where he observes : If the trusts had been to raise £20,000 for charities, (which we have seen would have been clearly void,) and after the sum had been raised, then to the devisees, as the intention would not have been in their favor, the heirs would have been let in.

Now, it is to be remarked in respect to all these cases : 1. That they afford conclusive authority that the words of the void clause of the will must be read, as effect was given to them in each case to except the estate from the residuary clause, under which it must otherwise have passed ; and 2. That they afford a most respectable body of authority, ancient and modern, upon the very point, in affirmation of the principle which naturally results on reading the clause, that though it fails in legal effect to carry the estate to the object intended, it clearly evinces an intent not to give it to the residuary devisee, and is, therefore effectual to separate the subject matter of the two devises ; and then, in the absence of any effectual or executed intent, to pass this estate by the testator, being an undisposed interest it descended to the heir at law.

Another ground was also urged by the appellant, to wit : that here was a remote contingent interest undisposed of by the will

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to the church, which would have passed under the residuary clause if the devise had been valid; founded upon the principle that the land reverts on dissolution of the corporation, or for breach of any condition upon which the property is given. I cannot think this view at all applicable to the case. It assumes, what is denied, that the devise is valid; for without this there can be no reversionary interest for the residuary clause to operate upon, and thus draw after it the body of the estate. The devise being void *ab initio*, on the decease of the testator the law must necessarily at once give such a direction to the estate as is in accordance with its principles. The *dissolution* of the corporation, or the *breach of the condition* of the gift, cannot have any effect upon the estate when the corporate body was never seized of it; the gift, of course, was nugatory. After this, the *contingencies* upon which the argument supposes the estate may pass, can never occur in respect to this estate, any more than they could in respect to an estate where a gift had never been attempted.

It was further insisted by the counsel for the appellant that a small portion of the premises, known as the *Shoemaker's field*, in possession of the defendants, was not embraced in the devise, and therefore undeniably passed under the residuary clause. This question turns upon the true construction of the description of the premises in the devise. The testator gives *all* his *right*, title, interest and property in and to *an equal fifth part, &c.*, of all that tract called and known by the name of the Shoemaker's field, &c., containing by estimation about sixteen acres; and which *tract* or parcel had been surveyed, and laid out some years before into 164 lots, with streets, lanes, &c., as would fully appear by an indenture with a map annexed, signed by all the proprietors, and by which it would appear that 35 of the 164 lots fell to the share of the testator, as therein marked, numbered and bounded. It further appears from the bill, and is admitted by the demurrer, that the testator, besides these lots, held as tenant in common with the other owners one-fifth of another part of the Shoemaker's field, which was left undivided, being about 200 feet by 100 feet, and which is also laid down

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in the partition map *as not divided* among the owners. Now, the question is, whether this undivided piece is included within the devise, upon a sound construction of the description.

The terms of the devise at first are general, and undoubtedly sufficient to embrace both the divided and undivided parcels, but they are succeeded by a very exact and particular location upon the ground—which *tract* or *parcel*, he says, was divided into 164 lots some years before, with streets and lanes according to a map and boundaries in the deed of partition, where each lot is particularly described. A general description of a lot or farm by a common name, succeeded by a location upon the ground by ascertained metes and bounds, must generally give way to the ground lines and corners, as they show with the most distinctness the piece intended to be conveyed. Thus, if I have a farm of 500 acres, and 100 is surveyed off by metes and bounds, and I convey all my interest in the farm, bounded as follows, and then give the ground lines and corners of the 400 *acres*, or of the 100 acres, there cannot be a doubt but the latter description would control ; it is definite, and cannot be mistaken. I have not been able to distinguish this from such a case, upon the facts as presented in the bill and answer. Nothing can be more minute than the particular description, and which restrains the general words, if any meaning at all is to be given to it. By this, the *Shoemaker's field* referred to, means the part divided into city lots, with streets and lanes, according to a certain survey and map, thereby locating upon the ground by metes and bounds, by streets and lanes, the tract or parcel intended to be devised. It is true, the general description speaks of a *fifth* ; but, from the remainder of the description, it seems obvious the testator meant that it was a *fifth* which had been subsequently divided between the owners. I do not however say but that the facts may be so altered on the trial at law as to change this result. But it seems to me a sufficient title is here made out to the undivided part to entitle the appellant to the discovery sought in respect to this piece, so that he may be enabled to litigate the question before the more appropriate tribunal, a court and jury.

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For these reasons, I am in favor of modifying the decree, so as to require a discovery in respect to this parcel, but for affirming it as to the 35 lots.

By Mr. Justice COWEN. It is admitted that the respondents were at the time of the execution of the will, and ever since have been a corporation, incapable of taking by devise or otherwise. The devise to them, therefore, was void *ab initio*. The question arising upon this state of the case is, whether the testator's interest in the land thus sought to be comprehended in this nugatory devise to the church, passed on his death to the residuary devisees, or descended to his heir at law.

If the devise to the church should be pronounced operative to take the land out of the residuary clause, a minor question has been made by the appellant, viz. whether the descriptive words in the devise to the church must not be construed to except the testator's interest in about 200 by 100 feet of *undivided land* lying between Nassau, William, Fulton and John streets, leaving so much at any rate to the undisputed operation of the residuary clause. The conclusion to which I have arrived upon the general question, renders it unnecessary for me to examine the restricted one.

Considerable time was devoted in argument to an application of the common and familiar principle of construction, that the intent of the testator is to govern. So far as the actual intent of the testator can be collected from the particular devise, no two minds will differ, and no two cases which ever spoke of the question have differed, that the intent of the testator is, upon such a will as this, precisely equal between the residuary devisees and the heir at law. By the devise of the land to the church, he intended to withhold it from both, and pass it to the corporation. It is equally clear, that had he stopped with the particular devise, it being void as a devise, the land would have descended ; because it is not sufficient that the testator manifest a naked intent, no matter how plain, to disinherit the heir. He will yet take if the land be not devised to another ; and this is not more out of favor to the heir than, according to the nature of the case and the

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policy of the law, which assigns to every thing an owner. Were it not for such a result, the title must remain in perpetual abeyance. It seems to be equally well established, that this tendency in favor of the heir is not to be counteracted by the will, unless by clear words or necessary implication pointing out one who is to take adversely to him. *Per Lord Eldon, in Tregonwell v. Sydenham*, 3 Dow, 194, 210. The single question, then, upon which counsel differ, and upon which the cases have certainly run into some conflict, is whether, after a particular devise, utterly void at the time, the residuary clause contain such clear words as shall disinherit the heir.

There can be no doubt that the residuary words as here used or as they are commonly used in a will, plainly comprehend the land contained in the nugatory devise, provided that is to be considered void at the date of the will to all intents and purposes. The will must then be read without it. The case is the same as if the testator had run his pen through the clause, stricken it from existence, and then published his will. Has the law done this for him? Has it declared the clause void *in toto*? The appellant holds the affirmative of this question. The respondents agree that the clause is void, but only as a devise, as passing an interest to the church; but that it shall still stand in the will for another purpose, and enure as a descriptive exception from the residuary clause. They claim to read the residuary clause thus: "All the residue of my property, *excepting the lands above described*." The appellant claims to read "All the residue of my estate except what is before disposed of." In general the legal effect of the residuary clause is to carry all the property and interest of the testator not before touched by the will; and it can make no difference whether the remaining property or interest were in his mind or not at the time. The words are of sufficient legal compass to take all interests which were not before *effectually devised* at the date of the will, from which time only devises made before the present revised statutes, 2 R. S. 2, § 5, were construed to speak. 1 *Powell on Dev.* 151, *Jarm. ed.* *Jackson, ex dem. Rogers v. Potter*, 9 Johns. R. 312. Here was never



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any devise to the church which the law could notice as such ; and where the will says *all the residue of my estate except what is above bequeathed and disposed of*, the clause must be read in the light of the law. What had the testator *as above bequeathed and disposed of*? Not the land ; and he must be taken to have known that he had not devised the land. Every testator is presumed to know the law, to write out the provisions of his will accordingly, and the case is the same as if he had recited a statute at length, declaring that a devise to this corporation should be void. It is the same as if he had said in the residuary clause, "I know that I have above failed to dispose of the land ; and all the residue not above disposed of, I give to my wife, her heirs and assigns forever." 18 *Wendell*, 297 to 300 ; also 291, 302, 303, and the authorities there cited.

It is said the statute of *mortmain*, being based upon local policy, was not imported to the colony of New-York, *Attorney-General v. Stewart*, 2 *Meriv.* 143, 156, and this was so held in the case cited by Sir William Grant, master of the rolls, with regard to the general statute of mortmain, 9 Geo. 2, c. 36. That statute was passed in 1736, after the will in question had taken effect ; and the question, therefore, cannot arise here. Were it necessary to consider the question in respect to the exception of bodies corporate in the statutes of devises of Henry VIII. the point would not be so clear. This country was, except in its greater amount of unseated land, as much open to the evil of corporate perpetuities, especially those of ecclesiastical concoc-tion, as the country from which we immediately derived our blood, our habits, our laws and our religion. The church has, in all ages and countries, had many agents whose mistaken zeal was ready to turn the dying fears of testators to the purposes of pious testamentary donations. The question, therefore, lay between depriving it of corporate powers altogether, or restricting its power of taking by devise ; and the latter was adopted. It is a policy, in fact, to this day, common both to the English statutes and our own. 2 *Kent's Comm.* 282, 3d ed. Accordingly I do not understand it to be denied that our ancestors imported the

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common law, as qualified by the English statute of devises. While the common law absolutely withheld the power of devising, except by the custom of Kent, and a few other places, 1 *Pow. on Dev.* 2, 4, the statute, for the reasons of policy which I have mentioned, while it made the power general, and authorized natural persons to take, imposed an absolute disqualification upon bodies corporate. 1 *Pow. on Dev.* 9. We have, therefore, not only the special clause of prohibition contained in the charter of the respondents, which of itself avoided this devise in fact; but we have a public statute known to the testator, and to be read as a part of his will, arresting and nullifying his attempt upon the principles of social policy. This view of the matter is, I think, sustained by the argument of the Chancellor in *The Canal Commissioners v. the People*, 5 *Wendell*, 445, and *Bogardus v. Trinity Church*, 4 *Paige*, 198. It appears to me, therefore, that upon principle the devising clause to the church must be regarded as void both for the purposes of devise and exception; that consequently the will should be read without it; and, being thus withdrawn, the residuary clause is left plainly to operate.

In respect to the cases upon this question, where the particular devise is void *ab initio*, even irrespective of its being so declared by a public statute, and even though the fact which renders it null may be unknown to the devisor, those in the *common law courts* are quite uniform, that the residuary devisee shall take. So far as I have been able to search, the case of *Greene v. Dennis*, 6 *Conn. R.* 292, is the only exception. A majority of the cases in *chancery*, though they agree that the particular clause cannot be read as a devise, retain it as an exception from the residuary clause, and by reading it as such, create an equilibrium, which the law turns in favor of the heir. But it seems to me the difficulty is very great in saying, that if it be void as a devise, the testator still intended to avail himself of it for the purpose supposed. For aught we can see, even without the general clause, it was at least indifferent to him in point of fact whether the land should go to the heir or not. The general clause is plainly sufficient both in legal effect and in literal mean-

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ing, to carry it away from the heir. Taking the whole therefore, I should infer that the latter was the real intent. By the residuary clause he designates a general heir to whom he intends everything shall fall which has not been before *effectually disposed of*. If this be not so, it is difficult to account for the use of words so comprehensive. The reasoning of the courts of law and the common sense of the case, as summed up in *Doe ex dem. Stewart v. Sheffield*, 13 East. 527, is, to my mind, entirely satisfactory; and I feel an increased confidence in its soundness and safety, when I find it adopted by the supreme courts of Massachusetts and Delaware, acting independently of each other's authority. *Hayden v. Stoughton*, 5 Pick. 528, 536, *Putnam, J. and books there cited. Doe, ex dem. Ferguson, v. Roe*, 1 Harrington, 524. My opinion is that the decree should be reversed.

By Senator HENRY A. LIVINGSTON. The question respecting this property, now under consideration, has for some time past agitated all the parties concerned or connected with the result. It is brought on an appeal by Lawrence L. Van Kleeck, against the Dutch Reformed Church in the city of New-York, on a decision made by the chancellor. The counsel engaged on both sides have endeavored to appeal to the common sense of this court, as well as to strict and established rules of law; and on that ground I feel emboldened to offer an opinion; I shall therequote but one authority in this case, and that shall be "the opinion of common sense."

I cannot be supposed to follow the various wanderings and labyrinths of the law, that have been with so much labor and eloquence brought before us; but a few facts, founded and connected with the case of this will and devise, may not be improper, even in one not aspiring to a profound knowledge of legal or technical learning.

The corporation of the Reformed Dutch Church in New-York are in possession of certain lands in that city, which the complainant avers they hold under the will of John Harberdinck, and that the devise under the will is void, because the church,

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as a corporation, is incapable of taking such a gift, and he claims a discovery and disclosure of the will, from the officers of that church, and an account of the income derived from the property.

The church deny the right of the complainant, as stated by him, to compel them to produce the will, and say, that if any individual or person whatever is entitled to make such demand, it is the heir at law and not the complainant, and this appears to be the whole question now before this court.

In judging upon wills, the rules of law appear to be founded upon the intention of the testator, and our first business then is, to find the meaning originally intended to be conveyed and understood, by the person making the will. By this will John Harberdinck gives sundry legacies to his own relations and friends, and he then gives to the Reformed Dutch Church of the city of New-York the lands now in dispute; their possession to commence after the death of his wife Mayken Harberdinck, and the income of the lands to be applied to the support of the ministers of the Reformed Protestant Dutch Church of New-York, and to all such ministers, who should in all future time be regularly called as such, and he declares his intention that it should never be applied to any other purpose. The testator then gives the remainder of his estate, real and personal, none excepted, whether the same shall consist in houses, lands, goods, chattels, gold, silver, moneys, negroes, bonds, mortgages, bills, book debts, or any effects, or estate whatsoever, none in the world excepted, unto his wife Mayken Harberdinck, during her life, and after her death he gives the remainder to his wife's relations. The ancestor of the complainant was entitled to one quarter of this residuary property—provided, and on the express condition that the residuary devisees, before they should be entitled to receive the same, should justly account and pay whatever of them were severally indebted to his estate, be it by account, bill, bond, mortgage, or any other way whatever. Now, at this remote day, we are wholly ignorant how, and in what manner, these accounts and debts were settled. Some of those persons may have forfeited their right by not paying what they owed to his estate, or

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perhaps all the residuary devisees have forfeited their rights by not fulfilling the terms of the will.

It is very evident that the testator intended to give, after the death of his wife, those lots previously in his will bequeathed to the church, in the fullest and most complete manner. He meant to dedicate those lands and their income to the maintenance of piety and religion, by supporting faithful ministers of talent, learning and character, in the church of which he was, no doubt, a worthy and pious member. He never contemplated that this property so given should enrich any individual, either his own or his wife's relations. His intention was to separate it from his other temporal possessions, and devote it to the noble purpose which he has expressed in his will. Then how does the complainant suppose himself to obtain a title? His ancestor was only to take one fourth of that remainder, which was given to Mayken Harberdinck during her life, and to her was given only the remainder of what was left of the estate, after the gifts and bequests to others should be completed and satisfied. It appears clearly that these lands were only intended to be enjoyed by the wife while she lived. This is not only evident from the expressions of the gift to Mayken his wife, but also from the character of the devise to the church: that is, a donation or gift clearly showing that this land was not intended by the testator, old Mr. Harberdinck, for any private or individual use or emolument. It was his intention, by the plain words of the will, to make a division of his estate, part for the use and benefit of man, and part for the service of his God; and whatever conclusions learned counsel and judges may arrive at, respecting the legality of the gift, no one can doubt the testator intended this separation.

- If, then, the testator did not intend or contemplate these lands to be enjoyed by individuals, the complainant's title must depend upon some rules of law different from carrying into effect the
- intention of the testator; or upon the right of courts to conjecture what the intention of John Harberdinck, who died more than a century ago, would have been, if he had known the gift to the church by him to have been void. As to any such right

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to conjecture, it is too unreasonable and uncertain to be at any time permitted, and no law case gives countenance to any such pretensions. Then, as to the law. It does not appear to have been denied by counsel, that if the will of the testator does not convey the property, it cannot be held except by his heir. The rule of law is a very wise one, as avoiding the uncertainty of titles, when a clear intention on the part of the testator is not made out to the contrary, and also commends itself to the feelings of mankind, on which it is no doubt founded. The heir at law is the nearest relative of a man's own blood ; to give the property to him, therefore, most commonly fulfils the just expectations of mankind growing out of their relationship. It helps to keep up the respectability of names and families, which all men are gratified with ; it also connects itself with the order of society in regard to marriages, legitimate births and social connections ; and on the whole, it rests on every principle which should be the foundation of rules and laws.

The only other ground on which the complainant founds his title is, that as the intention of this testator to give to the church was illegal, it cannot be taken into consideration in our investigation respecting the gift of the rest ; but this is by no means reasonable ; we must look at it with an endeavor to find out the testator's actual meaning of what he intended, when he speaks of the remaining part of his estate. The words "remaining part," give us to understand that something is separated. It tells us of a subtraction, nor can this subtraction be denied, because the purpose for which the part is taken away cannot be carried into effect, or the amount known, until the separation takes place ; then, and not till then, is the remainder found. It has been argued that the devise to the church was illegal ; it may be so, that the policy of the law does not admit of gifts by will to a corporation ; but when it is carried so far as to say that a gift for the promotion of piety and virtue is illegal, in such a sense as that judges must shut their eyes upon it, or look upon it with aversion, I must say it is a doctrine of which I am ignorant. I wish never to be so learned as to discover any

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thing in the virtuous intention of aiding and promoting the worship of God, or the benevolence of man to his fellow creature, to be hurtful to the state. On the contrary, I shall always be glad to open my eyes and look with pleasure upon such purposes ; and should the result of this case ever be that the lands in question should escheat to the state of New-York for want of heirs, it would, in my opinion, redound to the honor of the empire state to confirm to this church what John Harberdinck intended they should have. In the will of Mr. Harberdinck, he was mindful of his relatives in this country as well as of the church. He gives to Asweris Harberdinck the sum of fifty pounds. At first view this might appear a small affair, compared with what is now the value of the Shoemaker's field ; but a hundred and more years ago, fifty pounds sterling in gold, to a young shoemaker just starting into life, was far better and more valuable to him than an undivided share in a cow pasture, as it would enable him to commence his trade ; and I make no doubt young Asweris wished to have this cash, rather than a share in what was then wild land ; and calculating the value of property at an ancient date, it was the full value of his share, or what he had a right to expect from his aged relative. We have not yet so many liberal gifts for public purposes, as either to endanger the state, or to render more benevolence unnecessary ; and while I watch the progress of the future, yet I would not be suspicious of the past, and would prefer confirming rather than destroying the monuments of the piety and zeal of our ancestors. Taking, therefore, all the circumstances in this case as connected with this will, it appears to me, that the possession and emoluments of this estate, are exactly what was intended and wished by the testator, who felt an interest for his mother church, a branch of which was established in this country, and his genuine Holland blood flowed with a thrilling pleasure in performing what he did ; and that church has from his munificence grown and prospered precisely as he anticipated. When he gave this property, it was as a grain of mustard seed, but now by the lapse of a century or more, it has become a full grown tree,

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and the fowls of the air now seek a shelter under the shade of its branches ; the plain and fair interpretation of this will, then, it appears to my mind is fulfilled.

The counsel on both sides have given a latitude to their imaginations, and indulged their fancies with a peep through the long avenue of times past, and conjured up the form and figure of the testator. I also can paint to my imagination, the venerable Hollander, seated in his arm chair, which he brought with him from Holland, about commencing with his will. I see his anxious countenance and venerable form, slowly yet firmly grasp his pen and commence the solemn writing, with these words : " In the name of God, amen ; " with much thought and reflection. He bestowed what he then pleased upon his relatives and friends ; his brow was melancholy and heavy, until he came to the clause beginning with item, I, the said John Harberdinck, do hereby give, devise and bequeath, unto the Minister, Elders, and Deacons of the Reformed Protestant Dutch Church, of the city of New-York, and their successors, forever. Then a calm serenity came over him ; he felt that he had fulfilled the main object of all his earthly exertions, which was to do all the good he could during life, and then when eternity appeared opening before him, he found a pleasing reflection, that he had just completed what was near and dear to his heart ; and with a smile on his countenance, and a contented mind, I can see him calmly resign his spirit to his God who gave it. Often have I observed the picture, with the coat of arms suspended on the wall over the pulpit, in the North Dutch Church, in the city of New-York, in William-street, said to be of the Harberdinck family. The motto underneath is, *Dando Conſervat*. Until now I have been ignorant of the interpretation ; but by becoming acquainted with this will, it appears to me easily construed. By giving he has preserved it.

In the language, then, of the chancellor, in which he says the result at which he has arrived, upon a full examination of the subject, is, that there is not sufficient appearing upon the complainant's bill, to show that the residuary devisees of John Har-



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berdinck ever had any legal or equitable right to the premises in controversy in this case; and from the examination I have made, I am clearly in favor of affirming the learned and able opinion of the chancellor.

By Senator VERPLANCK. The bill in this cause, being for the discovery of the respondent's title, as a foundation for establishing the title of the complainant to the large real estate held by the Dutch Church in New-York, as well as to bring them to account for its rents and profits, it is admitted that the complainant must show on the face of his bill a perfect *prima facie* title in himself, before he can call upon the parties in possession to disclose their own title. This has been put, in the course of this cause, upon the requirement of the rules of pleading in our court of chancery; but I consider it as holding a much higher rank than that of a mere artificial or conventional rule of pleading, the abrogation of which might give new enlargement to the increased and increasing jurisdiction of chancery. The rule of equity, as expressed in the English decisions, that "to enable a party to claim a discovery, he must show an interest in the subject matter to which the discovery is attached, capable and proper to be vindicated in some judicial tribunal," is a fundamental doctrine of this branch of jurisprudence, and rests upon the soundest policy. Its object is to discountenance and check vexatious litigation, and preserve the quiet of society by protecting old possessions with all the complicated interests commonly dependent upon them, from the assaults of speculative and privateering adventurers, by withholding from such claimants that aid which it is the office of equity to afford to the fair suitor seeking only for the legal evidence of his probable rights. It comes to us not only with high authority from English equity and our own, but with the additional evidence of experience to attest its value, by the numerous evils that have been caused wherever it was neglected. See *Wigram's Points in Law of Discovery*. The rule itself is not now questioned; but I could not refrain from these passing remarks, because I hold it important for the general interests of

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society to place it upon its strongest ground, as well as to apply it strictly and rigidly.

What may be the precise ultimate ground on which the church rests its title, does not now appear. Whether it relies upon title from some source other than that shown in the case or on any peculiarity of the ancient colonial law, as has been intimated in the argument, we are not to inquire at present. The sole question now before us is, whether the complainant makes out a legal *prima facie* title in himself; since taking the case as it now stands in the pleadings, it must be assumed that the devise to the church was wholly void, as it would be at present under our statute of wills and the decisions of this court.

It is allowed by the complainant's counsel that the authorities are full and strong, and the law well settled, that devises valid at the time of their being made, but *lapsing* by reason of the devisee's death before that of the testator, fall to the heir at law, and are never to be considered as included in the general words of a *residuary devise*, however broad or general they may be. This doctrine is put by Chief Justice Willes, Chief Justice De Grey, Lord Chancellor Hardwicke, Judge Buller and other eminent Judges, on the ground of the testator's probable intent, coupled with the positive institutions of the law of descent. The testator, in all such cases, it is held, must presume that he has effectually disposed of all those particular estates thus specifically devised. Then, when he devises to his residuary devisee all the rest and residue of his real estate, he can only mean all his real estate except such as has been before specifically devised; just as if he had actually devised in express words all his real estate, with those exceptions specifically enumerated and described. Then as the special devises fail or lapse, the testator is found to be, *pro tanto*, intestate, and the law of descents gives those lapsed portions as to which he is intestate, to his heir at law. The language of the courts, as used by the great judges above named, is this: "The right of the heir at law does not depend upon the intent of the testator to give him that part of the estate; but upon the principle that the law gives the heir

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title to every part of the estate which the testator has not shewn a clear intent of giving to somebody else capable of taking it."

It is, however, now contended, that this rule does not apply to devises void *ab initio*, from the incapacity of the devisee to take, or as illegal and contrary to public policy, such as those to religious corporations. These, it is argued, must be treated as mere nullities, must be stricken out of the will, and must for all purposes of construction be regarded as if never made. Then it follows that the specific devise cannot be considered as excepted from the general residuary devise, but must be actually comprised within its words. To my mind, this distinction appears too technical and artificial to form a sound rule for the interpretation of the testator's intent, unless it be clearly so settled by former decisions. I cannot perceive any sufficient reason upon general principles of interpretation to take devises, void for incapacity in the devisees, out of the broad rule of lapsed devises. The intention of the testator must be the very same. The testator, alike in cases of devises lapsing from their own inherent vice, because illegal or impossible, and in those lapsing from an external cause not within his probable contemplation, expects both to take effect. He presumes the first devise to be to persons legally capable of taking it, but he is mistaken as to the law; he presumes the other to be to persons who will be naturally capable of taking in the ordinary course of events, and in this expectation he is also mistaken. His intention as to the residuary devisee cannot but be the very same in both cases. It is to give to him all his estate except that part which he had appropriated to another purpose, whether actually a legal purpose, or only one erroneously presumed to be so. He certainly never means to give him that part which he expressly appropriates to another object, although that appropriation becomes ineffectual by operation of law. The testator neither means to give such a devise to his heir nor to the person he selects as his residuary devisee. The devise fails; no matter for what cause. The law of the land then comes in and declares, "this man might have bequeathed his real estate to any one whom he thought

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fit to choose, with certain exceptions prescribed by public policy. In consequence of either the law, or the fact, turning out differently from his belief or expectation, he has not made such a devise of this part of his real estate as to take effect at his death; therefore he so far dies intestate, and the general rule of descents must give to his heirs all the real estate which he has not effectually devised."

Such a conclusion, I think, would be inevitable, were we now to settle the law without the light or the obligation of past decisions. It appears to me to be also the fair conclusion to be drawn from the authorities. The cases are undoubtedly not a little variant. The distinction relied on by the complainant between devises lapsing, because void in their inception, and other lapsed devises, was spoken of incidentally with some approbation by Ch. J. Willes, in his elaborate and lucid opinion in *Doe v. Underwood*, *Willes*, 293; but the decision in the case does not rest upon this distinction, nor necessarily imply its accuracy. In late years, the opinions expressed by every member of the court of king's bench, in *Doe v. Sanford*, 13 *East*, 526, (though here again not forming the ground of decision of the cause,) are still stronger, and go beyond the case of devises, void for illegality. Several other English cases looking the same way, as well as the express decision of the very respectable supreme court of the state of Delaware to this very point, 1 *Harrington's R.* 256, present no small weight of authority in favor of the claim of the residuary devisee to devises lapsing from their inherent legal defect. Nevertheless, after carefully examining the English and American cases referred to in argument—after consulting not only the express decisions in the courts of common law on the conflicting claims of heirs at law and residuary devisees, but also those in law and in equity on the collateral questions as to the comparative rights of the same parties in respect to pecuniary charges on real estate, void or failing; or as to particular estates or terms created for purposes not sustained by law, or otherwise failing—I have arrived at the decided opinion, that the preponderant weight of authority

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is in favor of the *heir*, and accords with the rule I have above stated as the fair conclusion from general principles. The English cases on which I most rely, are those of *Grosvenor v. Hallam*, before Lord Chancellor Camden, 2 *Blunt's Ambler*, 645; *Smith v. Saunders*, 2 *W. Black.* 736; *Hutcheson v. Hammond*, 3 *Bro. Cas.* 1128; *Collins v. Wakeman*, 2 *Vesey, jun.*, 683; *Tregonwell v. Sydenham*, in *Dom. Proc.*, 3 *Dow's R.* 194. With these concur the doctrine of Chancellor Hansen and the Maryland court of appeals in 3 *Har. & McHen.* 333, and that of the supreme court of Connecticut in a recent case, *Green v. Davis*, 6 *Conn. R.* 292. The chancellor has gone so fully into the history of the law, and the learning of the case, that I shall not attempt to go over the same ground in detail. I concur entirely in his conclusions on this part of the case.

There is another point important to the decision of this cause in its present stage, which the chancellor has not discussed, and which it is understood was not argued before him. It is whether or not the words of description in the devise of the lands in question passed the whole interest and estate of the testator in the Shoemaker's field, or only the lots which he held in severalty, leaving an undivided residue not disposed of. His will gives and devises, "all that my testator's right, title, interest and property in and to an equal fifth part, share and proportion of all that tract or parcel of land called the Shoemaker's field, on the N. E. of Maiden's Lane;" "which tract contains about sixteen acres: and by agreement of all the proprietors was surveyed and laid out into one hundred and sixty-four lots, with convenient streets and lanes to accommodate the same, as may fully appear by a certain instrument, with the map or chart thereof:" which instrument is there described. He then says, "By which indenture, with the chart annexed, it is declared and agreed that the said Harberdinck's *proprietie*, share and dividend in the said one hundred and sixty-four general lots should be and consist in thirty-five lots described, markt and numbered," &c.: all which, describing by number and bounds, he devises to the Dutch church, "with all and singular the buildings, messuages, emoluments,

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profits, benefits, reversions, advantages, hereditaments and appurtenances thereunto belonging or in any wise appertaining, or reputed or esteemed as part or belonging to the same." It is alleged by the complainant, and not denied, that a portion of this tract, being about two hundred feet in length and about one hundred in breadth, was left undivided by the proprietors. This undivided estate is not enumerated amongst the lots devised to the church; and if it is not included under the general description, as it certainly is not in the particular enumeration, there would then be left a residuum not intended to be disposed of by the testator, which would pass to the residuary devisee. If so, this land being in possession of the church, here is a sufficient foundation for a bill of discovery in equity, as there would be for a suit in a court of law for the recovery of so much of the land, unless that recovery were barred for some other reason.

I think, however, that the construction of this devise must fall within the rules established in our courts, as stated by Chief Justice Spencer in *Jackson v. Loomis*, 18 Johns. R. 81, and affirmed by the unanimous vote of our own court on the opinion delivered by Chancellor Kent, S. C. 19 Johns. R. 452: "If there be certain particulars sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant." The same doctrine is held and applied by Chief Justice Savage in *Doe v. Roe*, 1 Wendell, 550. Here the whole of Harberdinck's "right, title, interest and property in the land known as the Shoemaker's field is devised," in words and with particulars that sufficiently "designate the thing granted." Nor should any part of that devise be "frustrated" by reason of an additional description or recital of the several lots, "false or mistaken," so far as it omits to mention as part of that whole interest the undivided share of a lot admitted to be part of Harberdinck's estate and interest in that field. The later English cases, as *Goodtitle v. Southern*, 1 Maule & Sel. 299, and *Dow v. Dow*, 7 Taunt. 343, sustain the same rule in substance as it was laid down by Lord Mansfield in *Paul v. Paul*, 2 Burr. 1089, "that

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words not of limitation or restriction, but of description, will not vitiate any thing sufficiently described before." I cannot conceive any words more perfectly answering to the meaning of "words of description," than those in which the testator in this cause enumerated the lots which had fallen to him in the Shoemaker's field; whilst the general description of that field, and the devise of all his interest, right, title and estate therein, seem to me to describe sufficiently the whole property devised, which cannot therefore be vitiated by a defect in the enumeration of the lots. I regard the rule itself as one of very great value. It was not arbitrarily or hypothetically established, but was generalized by legal experience from a number of decided cases, in which it had been the object of the courts to ascertain the true meaning and intent of the grantor or testator. To disturb it by any contrary decision, would be to infuse more or less doubt and uncertainty into every conveyance or will, where the description of the estate granted is not made out with rigid and technical accuracy. If this be a sound and valuable rule in the interpretation of *deeds*, always prepared with due deliberation and commonly with professional assistance, how much more just and right is it to apply it liberally to *wills*, which must be so often unskillfully and incoherently drawn, and where it is admitted that the intention of the testator is the first and great object of inquiry.

But again: even without the authority or the guidance of this wise legal rule, we shall be led, I think, to the same conclusion, by an attentive examination of the words of the devise itself, if we give to them that liberal and fair interpretation which, from the nature of the instrument, they are entitled to receive. For I cannot think that the words, following the enumeration of the lots, "all which lots and parcels of land I devise," "with all and singular the buildings, messuages, reversions, advantages, hereditaments, and appurtenances thereunto *belonging or in any wise appertaining or reputed or esteemed as part or belonging to the same,*" to be of no force or meaning whatever. These and similar "drag-net words of the law," as Lord Mansfield has

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somewhere called them, are not without meaning because they are customary and common. On the contrary they are customary, and frequently employed precisely because they have a useful meaning. They are employed with the express intention of covering whatever might be accidentally omitted in express description, though intended to be included in the grant. So they seem to be meant to be employed here. Taken in connection with the broad and comprehensive words of the devise of Harberdinck's whole interest and estate in the field, they may naturally be interpreted to include all the undivided interest and estate in the property, appurtenant to the lots held by him in severalty. It is expressly admitted that the undivided fifth part of this parcel of land was a part of Harberdinck's property in the Shoemaker's field; then, supposing the devise to be otherwise valid, it requires the most strict and rigid rule of interpretation to exclude it from passing both under the general words of "all his right, title, interest and property in and to an equal fifth part share and proportion of that tract called the Shoemaker's field," and also under the subsequent words, as "hereditaments [a remarkable and most comprehensive phrase] and appurtenances belonging to the lots held in severalty, or in any wise appertaining, or reputed or esteemed as part and belonging to the same."

It was also argued that there was still another residuary and contingent interest arising from the possibility of a dissolution of the corporation or of a breach of the conditions imposed, whereby the whole devise might revert, and that such possibility was sufficient to form a contingent interest passing under the residuary devise, which, however uncertain and improbable, is yet sufficient to support a claim for discovery or even to show that it was not the testator's intention to exclude from the residuary devise, the specific bequest, if it should lapse. It appears to me that neither the reason of the thing nor the cases cited bear out this proposition. When a specific devise is made, to take effect on performance of a given condition, or upon some express contingency happening, there is evidently a reversionary and contin-



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gent interest, which it is apparent from the will itself was within the intent and contemplation of the testator. Its existence is implied in the very words expressing the condition. It is therefore but a reasonable presumption, that the testator meant that such reversionary contingency which he has himself expressly created, should pass under the general words of a residuary devise. The authorities cited, as *Goodtitle v. Knot*, Cowp. 43, *Hayden v. Inhabitants of Stoughton*, 5 Pick. 528, and others, (most of which have been noticed by the chancellor,) go only to the case of such devises as it is evident that the testator regarded as contingent; as where an estate was devised for payment of debts, in case the personalty was insufficient for that purpose, or where there was money to be paid, or some specific act to be done, as the express condition without the happening or performing of which no estate was to pass. Here there remained an interest which the testator could not but have had in view, and which he must have considered as possibly to form a part of his residuary estate not specifically devised, at the very time that he devised that residuum. But Harberdinck devises absolutely to the corporation of the Dutch Church, "to be received and employed to the proper use, benefit and behoof, and for the payment of the salary of the minister or ministers, and to no other use." Here is an absolute devise to a corporation for certain purposes, being in furtherance of the very objects of their creation and within their powers, and the right application of which, if the devise were otherwise good, equity, in case of abuse, could compel. It is not a devise on condition of supporting ministers, upon failing to perform which the estate would revert. The misapplication of the fund would not work a forfeiture; it would be a breach of trust to be corrected by judicial authority. It is not reasonable to suppose that such an interest was within the possible contemplation of the testator.

For these and other reasons assigned by the chancellor, my opinion is, that the heirs at law can alone take advantage of the defective title of the church, (if such it be,) and are alone enti-

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tled to a discovery ; and that therefore the decree of the chancellor should be affirmed in all things.

By Senator WAGER. There are two principal questions in this cause : 1. Did the land attempted to be devised to the church, pass to the *residuary devisees*, under the will ; or did it descend to the *heir at law* of the testator. 2. Supposing the land attempted to be devised to the church, descended to the heir, did that attempted devise embrace the *undivided portion* of the Shoemaker's field. If either of those points are determined by this court in favor of the appellant, then it follows that the demurrer should have been overruled by the court below, and that the decree there rendered must be reversed.

If the devise to the church can be regarded by the court as a portion of the will, for the purpose of collecting the actual intention of the testator, in the disposition of his estate, there can be but little difficulty in coming to a conclusion, that the testator's intended bounty to the church in this case, does not fall into the *residuum* for the benefit of the residuary devisees, but goes to the testator's heirs or escheats for want of heirs. My first impression was, that a devise which was void for want of legal capacity in the devisee to take, was to be regarded, for the purpose of construction, as no devise ; and that the will was to be construed as if it had never been incorporated in it ; that no particular intent of the testator could be looked to as shedding light upon the whole of his intention, but such as would cast his bounty upon an object which the law had not deprived of the capacity to take that bounty. My examination of the cases cited by the counsel on the argument, and those referred to by the chancellor in his opinion, has not confirmed this impression. That examination has led to the opinion that we must look at the different parts of a will, whether valid or invalid, as reflecting light upon other parts, and as indicating the intention of the testator ; which must control in the disposition of his property by will. Possibly the law may exclude from the consideration of the court a devise which the testator was inhibited from attempting. But whatever the law

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may be in such case, the one under consideration does not come within the rule. The devise to the church is void, simply because the law has not given to it a capacity to take or hold property beyond a certain amount, which amount it had acquired and held at the time of the devise. The devise in this case is, in most respects, analogous to a devise to one who is dead at the time. Neither have a being capable of taking. A devise to either is not, as it regards the testator, either *malum in se*, or *malum prohibitum*.

I do not deem it necessary to refer particularly to the cases which show, that courts may, in construing wills, look to a devise to one legally incapacitated to take, as throwing light upon the intention of the testator in the disposition of his property. They are most of them referred to and ably commented upon in the chancellor's opinion. The cases of void devises, whether arising from the death of the devisee at the time of the devise, or the legal incapacity to take, relied upon by the chancellor in his opinion, all turned upon the ground that the particular intent to devise the specific property, excluded it from the *residuum*, and consequently left it undisposed of by the will. There are but one or two cases which hold that property attempted to be devised, is cast into the *residuum* for the benefit of the residuary devisee, and they have not since been recognized in any case that I can find where they were directly in point: those cases did not receive that careful consideration which was bestowed upon the cases relied upon by the chancellor. The principal case, that of *Doe v. Sheffield*, turned almost entirely upon another ground, though the judges all concurred in opinion that the residuary devisee took what was attempted to be given to a person who was deceased at the time of the making of the will.

The law is well established both in England and in this country, that a *lapsed devise* goes to the heir, and not to the devisee of the *residuum*. The devise of real estate, operating only upon the land of which the testator was seized at the time of making his will, he having showed an intention to give away the land specifically devised, to the exclusion of the residuary

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devisee, it is not presumed that he intended to devise by the residuary clause, a contingency which he could not have foreseen, or to embrace in it lands contained in the lapsed devise. *Doe v. Underdown, Willes*, 293. *Durour v. Matteux*, 1 *Vesey*, 322. *Vide also 4 Kent's Comm.* 525, 526. The law, however, in relation to *lapsed legacies* is different. In such case the legacy goes to the residuary legatee. The reason assigned in some of the leading cases being, that the personalty being of a more fluctuating nature, the will is to be constructed in relation to the situation of such property at the death of the testator; which in consequence of the death of the object of the testator's bounty, or other causes operating to defeat that bounty, would be embraced by the residuary clause. 2 *Black. R.* 738. 15 *Vesey*, 709. 4 *Kent's Comm.* 525. This rule of the common law, as regards personalty, was adopted at an early day, when personal property was not of as much consequence as real, and consequently did not engage the scrutinizing attention of the courts. It has, however, whether arising out of the civil law, as some suppose, or from the nature of the thing regulated, become the established law of the land.

Chancellor *Kent*, in his *Commentaries*, 4th vol. 527, supposes that the alteration of the law in New-York, making the devise operate upon all the real estate owned by the testator at his death, may produce the effect of destroying some of the distinctions between testamentary dispositions of real and personal estates. *Vide Notes of Revisors*, § 7, ch. 6, tit. 1, part 2. The provision of the statute was intended to embrace real estate acquired subsequent to the making of the will. The principle adopted is a broad one, and may operate to break up the distinction which now exists between lapsed devises and lapsed legacies. It can, however, be applied only to such wills as have been made since the alteration of the law; it has no application to the will under consideration. I consider the rule well established at common law, that devises of real estate are to be construed in relation to the situation of the property at the time of executing the will.

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If, then, we are to regard a void devise as evidence of the testator's intention, and to act upon such evidence of intention in determining the estate of residuary devisees, I can see no well founded distinction between a case where the invalidity of the specific devise arises out of the incapacity of the devisee from any cause to take, and one where the devise lapses on account of the death of the object of the testator's bounty. In either case, there is a clear actual intent, at the time of making the will, to exclude *both* the heir and residuary devisee from a participation in the estate attempted to be specifically devised. It remains, then, so far as actual intent is concerned, undisposed of by the will. The law, which declares that the heir shall not be disinherited but by express words, or clear and necessary implication, steps in and gives him the estate. 2 *Vesey*, 225. 3 *id.* 493. 1 *Ball & Beat.* 543. There is nothing in the will of Harberdinck which tends to show an intention to give the property in question to the residuary devisees, except the implication arising from the general intent not to die intestate as to any part of his estate, and the fact that he had devised the residuum to the exclusion of the heir. But this implication would be equally strong in favor of a devisee or legatee, to whom he had specifically given particular portions of his property. In both cases, he makes those *objects of his bounty* who are not of his blood, to the exclusion of the heir: and yet it would hardly be pretended that a specific devisee in such a case would take the subject of a void devise to another. If it be said that the devise of the residuum was specific, and excluded what was before given, the answer is, every devise of real estate must in its nature be specific, whether made in special or general terms. 7 *Vesey, jun.* 147. Consequently, what has before been devised or attempted to be devised, must be excepted, unless the language used is such as to show an evident intention of the testator to embrace such preceding devises as shall fail. It was also said that the rule of law which favors the heir, against the general intention of the testator to dispose of all his estate by will, arose in an aristocratic age, is calculated to keep large masses of property in few hands, and is

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consequently repugnant to the genius of our republican institutions. The effect of the rule in England, where the law of primogeniture prevails, and where large estates descend to one, to the exclusion of many other of the children, may have been contrary to the spirit of our institutions. But here, where all the children inherit equally, I can see nothing in it which is against our notions as to the division of estates. Nor does it in the least conflict with the right of the owner of property, to bestow his worldly substance upon such as he may choose to make the recipients of his bounty.

The intention of the testator is the first and great object of inquiry in the construction of wills; to it technical rules, which prevail in respect to other dispositions of real estate, are to a great extent subservient. If that can be determined, it is the pole-star by which courts must be directed in the administration of justice. With this great principle in view, it is nearly impossible for any one to read the will of John Harberdinck, and say that he intended to give the property in question to the residuary devisees. What he does give to them is the "rest and remaining part of his estate, except what part as above is bequeathed and disposed of;" in other words, except the specific portions above carved out by him, and which he has devised to others. Words could not make the intention plainer than it is made by this will. But it is said that it is not *devised* to the church, though such was the intention of the testator. To this it may be answered that he did not intend to give nor has he given it to the *residuary devisees*. To whom then shall it go? The answer is plain; to those who the law declares shall take all which the testator has not given to others, though it appear to be his intention that they should not inherit his worldly substance. The heir takes even against general intention.

The counsel for the appellant contend, that notwithstanding the testator's attempt to devise the land to the church, and admitting that he actually intended that the residuary devisees should take nothing which he had attempted to give the church, there yet remained in legal contemplation a residuary and contingent interest, founded on the condition annexed by law to ev-

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ery devise of this sort, that the land may revert by the dissolution of the corporation, or by breach of the condition on which the devise is made; that this residuary and contingent interest was a proper subject of devise, consistently with the declared intent of the testator; and even had the devise been valid, would have gone to the residuary devisees. That the descent to the heir was thus broken; and that the actual devise of the reversionary and contingent interest to the residuary devisees, drew along with it the whole estate, the devise to the church being void. If the will in this case had been so drawn as to make it apparent that the testator contemplated the events which would work a dissolution of the corporation, and had the church been able to take, the position of the counsel as to the devise of the reversionary and contingent interest, may have been good. In such case, the residuary devisees could take only the reversion, after the existence of the corporation should cease. The cases where a reversionary and contingent interest in real estate have been held to pass by the devise of the residuum, are all cases where it is *apparent* that the testator *contemplated* the events which would defeat the estate devised specifically. They proceeded upon the broad and rational principle which must control; of passing the estate according to the intention. Technical rules may sometimes presume intention, where there is nothing in the will to conflict with them, and show that the *presumed* could not have been the *actual* intention of the devisor. It is only in the case of a grant to a corporation, where a future interest can be expectant, on a grant in fee simple absolute. 2 *Black. Comm.* 256. I can, therefore, hardly suppose, where a devise is made to a corporation in fee simple absolute, that because there may by possibility be a contingent future estate, the devisor shall be deemed to have intended it to fall into the residuum, and thereby break the descent to the heir, in case the corporation should labor under a legal incapacity to take. The testator, in such case, would intend to devise to the corporation the whole estate. The dissolution of a perpetual corporation is of rare occurrence, and one which can hardly be supposed to be in the contemplation of ordinary minds. The contingency must therefore be regarded as

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too remote to require an artificial rule to presume an intention to pass the reversionary and contingent interest. This rule, I think, should not be applied, except in cases where the immediate estate in fee passes to the corporation under the specific devise, which corporation is subsequently dissolved. In such case, the descent to the heir would be broken by the devise from him of the whole estate, and the reversionary and contingent interest, from the nature of the case, may, perhaps, be presumed to have been intended to pass, by a devise of the residuum. In the case under consideration, there are circumstances which rebut any presumption that the testator supposed there would be a residue of the estate devised to the church. It is a perpetual religious corporation, by grant from the crown, of which the testator was a member. He supposed it would be as perpetual as the religion and doctrine which they professed; to cherish and aid in the perpetuation of which, he bestowed his bounty upon it. He must, then, have supposed that the devise which he attempted, would pass the whole estate in the Shoemaker's field. Besides, he devises a life estate in the residuum to his wife, after the devise to the church, which was to take effect after his and her death. This is totally inconsistent with the idea that he intended the possible contingent and reversionary interest in the Shoemaker's field should pass by the residuary devise. It is repugnant to the general rule that a will must be so construed as to make all its parts harmonize, if possible.

It remains only to consider the second point above suggested—that the deviser did not intend to pass to the church his interest in the *undivided portion* of the Shoemaker's field.

The clause in the will devising to the church commences by devising, in fee, "all the testator's right, title, interest and property in and to an equal fifth part, share and proportion, of all that tract or parcel of land, situate, lying and being upon Manhattan's Island, within the city of New-York, called or known by the name of Shoemaker's field." Had it stopped here, no doubt could be entertained that he intended to pass his whole estate in the field, whether divided or undivided. The only enquiry is, did he intend by the language subsequently used, to



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limit or restrain the extent of the above devise? Much of the subsequent part of the clause was intended by him to be a further and more particular description of the property devised; and my opinion is that the draftsman, from want of particular attention to the deed of partition and chart thereto annexed, which shows the undivided as well as the divided parts of the field, omitted to mention the undivided portion. This error was not detected when the will was read over before signing. The devise is of all his interest or a fifth part or share in the field—not of all his interest in 35 lots set apart to him on a partition of the field among the proprietors thereof. The devise, as contained in the first part of the clause, was *certain* and *definite*; the further description being unnecessary, it is immaterial, and may be rejected whether true or false.

In the case of *Goodtitle v. Paul*, 2 Burr. 1089, there was a devise in these words: "I give and devise to my dear wife my farm at Bovington, in the tenure of John Smith." A part of the farm consisted of woodland, which the testator kept in his own hands, and which was not in the tenure of John Smith. It was held that the whole farm, including the woodland, passed by the devise. It is manifestly intended, said Lord Mansfield, that the whole farm should pass by the will; and the testator never thought of any restriction of his devise; but meant these words, "in the tenure of John Smith, only as additional and further description of a thing sufficiently ascertained before." In *Marshall v. Hopkins*, 15 East, 309, the testator devised "all that my messuage, dwelling house or tenement, with all the lands, hereditaments and appurtenances thereunto belonging, situate and being in Blythbury, in the parish of Mavesyn Pridware, in the county of Stafford, now in the occupation of Thomas Willet, except one meadow called Floodgate meadow." The testator owned the messuage, and about nineteen acres of land in Blythbury. The messuage and rather more than two acres of land were in the occupation of Thomas Willet; the remainder of the property in Blythbury was occupied partly by the testator himself and partly by others. The devise was held not to be confined to the land in the occupation of Thomas

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Willet, but extended to all the land in Blythbury except the meadow, which was specifically excepted from the devise. *Vide also*, 1 *Maule & Sel.* 299. In the case of *Doe v. The Earl of Jersey*, 1 *Barn. & Ald.* 550, the rule is established that where the property is sufficiently described in the devise, so as to leave no fair ground to doubt as to what is embraced, that then the addition of another circumstance, with a view to identify it, will not limit and restrain the devise, unless it clearly appears that the testator so intended it. *Vide also*, 3 *Co.* 10 *a*, *Dowtie's case*; *Doe v. Greathed*, 8 *East*, 103. In the case of *Gascoigne v. Barker*, 3 *Atk.* 8, the testator devised in these words: "All my lands, tenements and hereditaments, in possession, reversion, freehold and copyhold, in the parish of Chiswick or elsewhere in the county of Middlesex, which copyhold lands I have surrendered to the use of my will." The testator was seized of a copyhold house, which was an inn, called "The King of Bohemia's Head." Three parts of the house were in one manor and one in another. He had surrendered to the use of his will only in the manor under which the three parts were held. Lord Chancellor Hardwicke held that the words "which I have surrendered to the use of my will," restricted the devise to the copyhold surrendered, because the land was devised by general words; but he says, "if instead of this, the testator had said, I give my messuages with the appurtenances called the King of Bohemia's Head, that would have been a different case, and I should have thought the subsequent words a mistake only in the description."

The rule, as collected from the cases which I have been able to examine, seems to be that where the devise is in general terms, the subsequent words of description will restrain the extent of the devise; but where it is specific and certain as to the property, the subsequent description may be rejected. Now in the case under consideration, there is no ground to doubt as to the property embraced in the first devise. The Shoemaker's field was a definite description of a known piece of property. "All the testator's share or interest in it," embraced the undivided portion

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as well as the 35 lots which had been set off to him in severalty. Suppose in making the further additional description, the draftsman of this will had inadvertently omitted one or two of the divided lots; there cannot be a doubt but that the omitted lots would have passed under the broad and sweeping devise contained in the first part of the clause. The mistaken description would have been rejected, under the decisions above referred to, as unnecessary to identify the property. The repetition of the devise in the subsequent part of the clause, after the description of the divided lots, does not show that the testator intended thereby to except the undivided portion. The repeated devise, by the same mistake which occurred in the further description, is by general words, "all which lots, pieces or parcels of land," made to embrace only the divided lots. It is not inconsistent with the idea that he had given all his interest in the field, which had been devised in the former part of the clause, as fully as language could do it.

My opinion is, that the complainant has shown no valid claim to the property in question, under the will. The demurrer was therefore well taken, and the decree of the chancellor ought to be affirmed.

The delivery of the opinions being concluded, the following resolutions were proposed and passed upon by the court :

I. Resolved, that the land included in the devise to the church *did not pass* under the *residuary clause* in the will.

II. Resolved, that on the true construction of the will, *the whole* of the tract or parcel of land called Shoemaker's field—not only the part allotted and divided, but the piece undivided—was included in the clause devising to the church.

On the question being put, shall the *first resolution* be adopted? the members of the court divided as follows :

*In the affirmative* : The PRESIDENT of the Senate, Chief Justice NELSON, Mr. Justice BRONSON, and Senators J. BEARDSLEY, L. BEARDSLEY, BECKWITH, FOX, HULL, H. F. JONES, LACY, LEE,

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H. A. LIVINGSTON, MOSELEY, POWERS, SKINNER, SPRAKER, STERLING, VERPLANCK, WAGER—19.

*In the negative:* Mr. Justice COWEN, and Senators DOWNING, HUNTINGTON, JOHNSON, LAWYER, VAN DYCK—6.

On the second resolution, the members divided as follows:

*For its adoption:* The PRESIDENT of the Senate, Mr. Justice BRONSON, and Senators J. BEARDSLEY, L. BEARDSLEY, HULL, LEE, H. A. LIVINGSTON, MOSELEY, POWERS, SPRAKER, STERLING, VERPLANCK, WAGER—13.

*Against its adoption:* Chief Justice NELSON, Mr. Justice COWEN, and Senators BECKWITH, DOWNING, FOX, HUNTINGTON, JOHNSON, H. F. JONES, LACY, LAWYER, LOOMIS, SKINNER, VAN DYCK—13.

Whereupon the decree of the chancellor was AFFIRMED.

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STODDARD and others *appellants*, and BUTLER and others *respondents*.

A decree in chancery, adjudging an absolute sale of personal property by a debtor to his creditor *fraudulent and void* under the statute as against creditors, on appeal was affirmed in the court for the correction of errors; the property transferred being deemed to be of a value more than sufficient to satisfy the debt of the vendee; the transfer having been made during the pendency of a suit by other creditors; and the vendor having continued in possession, disposing of the property as the agent of the vendee, and receiving a compensation for his services as such agent.\*

APPEAL from chancery. The respondents filed a bill in chancery, before the vice chancellor of the fifth circuit, to *set aside as fraudulent* an assignment made by Stoddard, one of the ap-

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\* The *affirmance* in this case was a *pro forma* affirmance; the members of the court being equally divided, viz. 12 for affirmance and 12 for reversal. Opinions were delivered by Judges BRONSON and COWEN, and Senator YOUNG, for affirmance, and by Senators DICKINSON and VERPLANCK, for reversal. The statute having declared that every sale of goods and chattels, unless accompanied by an im-

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pellants, to Thurber and Townsend, the other appellants in this case. The respondents being creditors of Stoddard, commenced a suit in *January*, 1834, for the collection of the demand due to them. In *May* they recovered judgment for \$727.57, and on the *tenth* day of the same month issued an execution to the sheriff of *Lewis* county, where Stoddard resided, which, on the

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*mediate delivery*, and followed by an *actual* and continued *change of possession*, shall be presumed to be fraudulent and void as against the creditors of the vendor: the judges held, in the opinions delivered by them, that a sale of chattels unaccompanied by an immediate delivery, and followed by an actual and continued change of possession, is *fraudulent* and *void* under the statute, although it be made openly, in good faith, and without any intent to defraud, unless there be something in the circumstances of the case rendering a change of possession *impracticable*, either from the nature or situation of the property, or the peculiar circumstances of the parties: in other words, that where there is no change of possession unless it be shown that there was a *necessity* or a *manifest fitness* and *propriety* for the continuance of the possession by the vendor, independent of benefit to him, the sale is *void*; that nothing can take the case out of the operation of the statute, unless the *attempted explanation* relate to the *possession* of the property; that the *bona fides* of the transaction, and the *absence of all intent to defraud*, is not enough to render the sale valid. In the views of the judges, Senator YOUNG concurred.

On the other hand, Senators DICKINSON and VERPLANCE, in the opinions delivered by them, held that though a sale unaccompanied by a change of possession is declared by the statute to be *prima facie* fraudulent and void, still if it be shown that such sale was *publicly* made, in *good faith* and *without any intent to defraud* creditors or purchasers, for a *fair* and *full consideration*, and that the motives for *leaving the property* in the possession of the vendor are such as ordinarily influence honest men, the presumption of fraud is destroyed, and the sale must be deemed valid. They also held, that in cases of this kind the question of *fraudulent intent* (in a court of law) is to be passed upon *exclusively* by the *jury*; that whilst it is the province of the *court* to determine upon the *relevancy* of evidence offered in the case, none offered having a direct bearing upon the question of *bona fides* should be excluded from the consideration of the jury, by the application of general rules of policy or of legal presumption growing out of the want of change of possession.

Upon the circumstances of this particular case, the *judges* and Senator YOUNG on the one hand, and Senators DICKINSON and VERPLANCE on the other, differ in their views of the *fairness* of the transaction, and the circumstances relied on to excuse a want of change of possession: the former holding that the property transferred was *disproportioned* in value to the amount of the debt intended to be satisfied; and that the *motives* for leaving the property in the possession of the vendor were not such as could be approved. Whereas the latter senators hold directly the reverse upon both points.

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*twenty-sixth* day of May, was returned by the sheriff *nulla bona*. In the interim between the commencement of the suit by the respondents and the recovery of the judgment, to wit, on the eighth day of *March*, Stoddard executed an *absolute* assignment of the remainder of a stock of goods which he had on hands as a merchant, and of certain notes and accounts to Thurber and Townsend, *for and towards* the payment and satisfaction of a debt of \$675, due to them. The goods thus assigned were valued at \$435, and the amount of the notes and accounts was \$927.83, which were esteemed good, at least, for \$681. The goods consisted of many parcels of small value, separately, and the notes and accounts were against numerous persons, and principally for small amounts. The goods and notes and accounts were *left in the possession* of Stoddard, who was authorized by Thurber and Townsend, as their *agent*, to sell and dispose of the goods for cash or good security, and to collect the notes and accounts, and they agreed to pay him a *fair compensation* for his services; and he accordingly acted as such agent until the thirteenth day of *June*, 1834, when Thurber and Townsend removed the goods then on hands to *Utica*, where they resided, and at the same time took possession of the notes and accounts which remained unpaid. After the assignment, and up to the time of the removal of the goods to *Utica*, Stoddard had sold goods to the amount of \$77, and had received on the notes and accounts and for goods sold, the sum of \$122. It was admitted by Stoddard that he had no property other than that assigned, except his household furniture, valued at \$150; and it was proved that he had no visible means of supporting himself and family other than his business as a merchant; that after the assignment, he continued in his store, trading as usual, until the goods were removed to *Utica*, and that no difference was observed in the management of the store after the assignment from what had been usual previous to that event. Two witnesses who were examined on the part of the complainants below, and they both testified that they resided in the same town with Stod-

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dard, and heard of the assignment about the time that it was made. The bill in this case was filed on the 18th *June*. Previous to that time, to wit, on the 21st *May*, the complainants demanded of the defendants, Thurber and Townsend, an assignment of the notes and accounts which they had received of Stoddard, and offered to pay to them the amount due to them from Stoddard, deducting the value of the goods and such moneys as had been paid on the notes and accounts. The defendants, Thurber and Townsend, refused to accede to the proposition, but offered on their part to yield up to the complainants the property assigned by Stoddard, accounting for such portions thereof as had been converted into money, on the complainants paying the debt due to them from Stoddard, with the interest thereof and the expenses they had incurred : which offer was declined by the complainants. The defendants denied all fraud or intent to defraud, or secret trust for the benefit of Stoddard.

The vice chancellor, on hearing the cause on the pleadings and proofs, *dismissed* the bill. The complainants appealed to the chancellor, who *reversed* the decree of the vice chancellor, adjudged the assignment to be *fraudulent* and *void* as against the complainants, and set the same aside. He also directed an account of the goods assigned by Stoddard in the possession of Thurber and Townsend *at the time of the issuing of the complainants' execution*, and of the debts and choses in action assigned which had not been collected *previous to the filing of the bill*, and of the moneys received on account of such debts since the filing of the bill. The following is the opinion delivered by the CHANCELLOR :

“ Upon a careful examination of the answers of the defendants, and the evidence in this case, I think the conclusion of the vice chancellor that the assignment of Stoddard's property was not fraudulent, was erroneous. Independent of the legal presumption of fraud, arising from his continuance in possession after the execution of the absolute bill of sale, I think the amount of property assigned was, at its fair value, much more than sufficient

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to pay the debt due to the purchasers. The case would have been somewhat different, if Thurber and Townsend had taken the property in absolute satisfaction of their debt and at their own risk, or if they had taken an assignment of the property in trust for the other creditors, after securing to themselves a preference in payment out of the same. But as I understand the transaction, the bill of sale to them was absolute, so as to give them the full benefit of all the property and debts assigned, if the amount realized therefrom should be more than the amount of their debt, but to be applied to the extinguishment of their debt *pro tanto* only, if the proceeds of the assignment should for any reason turn out to be less.

As the nominal amount of the goods and debts assigned was more than double what was actually due to Thurber and Townsend, I can see no reason for the making of an absolute sale and assignment of all his property to them without any risk of loss on their part, unless it was upon some secret or implied understanding between the parties to that transaction to keep the surplus from other creditors for the benefit of Stoddard himself. Besides, there never was in fact any change of the possession of the assigned property, until after the issuing of the complainant's execution, as the nominal appointment of the seller as the agent of the buyers to retain the possession and retail the goods and collect in the debts for them, without any visible change in the mode of doing business at the store, was not a change of possession within the intent and meaning of the statute on this subject. The sale must be accompanied by an actual and continued change of possession, as well as a nominal and constructive change, or the transaction will be deemed fraudulent as against creditors. A construction which would allow the vendor or assignor of a store of goods to continue in possession thereof, and to sell them out as the agent of the purchaser, or assignee, would render this statutory provision for the prevention and detection of frauds a mere nullity. For these reasons, the decree of the vice chancellor must be reversed, with costs."

From the decree of the chancellor, the *defendants* below appealed to this court, where the cause was argued by



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*W. Crafts & S Stevens*, for the appellants.

*C. P. Kirkland & S. Beardsley*, (attorney general,) for the respondents.

*Points on the part of the appellants :*

I. The assignment to Thurber and Townsend, in payment and satisfaction of their debt, is good and valid, and not fraudulent. They gained a preference, which the law allows. *Hall v. Tuttle*, 8 *Wendell*, 375. *Gardner v. Adams*, 12 *id.* 297. *Loop v. Comstock*, 15 *id.* 244. 19 *Johns. R.* 222.

II. No more than a reasonable amount of property was assigned in payment of the debt. The goods assigned were remnants of an old stock, from which Stoddard had been selling the previous winter ; and the debts assigned were against one hundred and ten persons, in small sums, scattered over the whole county of Lewis, and it probably would cost one-half of the amount to collect them. Thurber and Townsend, at the time the assignment was made, had no reasonable ground to believe that the property assigned to them would be more than sufficient to pay their debt ; they had a perfect right to insist upon an ample amount, without running any risk. *Peck v. Burdett*, 1 *Paige*, 309.

III. If the respondents supposed that more property was assigned than sufficient to pay the debt of Thurber and Townsend, they might have framed their bill with a double aspect : first, to set aside the assignment, and if that was not done, then that the surplus, if any, might be applied in payment of their debt. *Cunningham v. Freeborn*, 11 *Wendell*, 257, in *Court of Errors*, by *Ch. J. Nelson*.

IV. Before the bill was filed in this cause, Thurber and Townsend offered to give up to the respondents all the property assigned, if they would pay their debt. This proposition was refused ; and the only reason which can be assigned for the refusal, is that they knew Thurber and Townsend had no more than was sufficient to pay their debt.

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V. The appellants, in their answers, deny any fraudulent intent, or any secret or implied understanding between them, or either of them, at the time the assignment was executed, that any part of the property assigned was to be retained by Thurber and Townsend for the future benefit of Stoddard, or for his use, or for the benefit of any other person; and there are no facts or circumstances attending the transaction, nor any proof to show that they had any such intent.

VI. The two witnesses examined in this case testify as to the value of the goods, but at the same time say that they never examined the quality of the goods and knew nothing about them. They merely gave their opinion from looking at the inventory, and what such description of goods would be worth in Lewis county, without taking into consideration that the appellants would be under the necessity of taking the goods back to Utica, where they were purchased, and selling them for what they could get. They also testify as to the character of the debts, from their impressions, that they, living in the county of Lewis, and doing business there, as merchants, might, by management, collect a great proportion of the debts.

VII. The goods assigned did not remain in the possession of Stoddard after the assignment, but passed by the assignment, and were in *law* and in fact delivered to Thurber and Townsend, who had the same right to appoint Stoddard that they had to appoint any other person their agent for the purpose of selling the goods. The sale by Stoddard was notorious in the neighborhood. Stoddard acquired no false credit by being the agent to sell the goods. He could do better for the assignees than a stranger. Thurber and Townsend resided at Utica—a distance of about seventy miles—and at that season of the year could not very well remove the goods, and they had every reason to suppose that they would sell better at Lowville than at Utica. *See 19 Johns. R. 222.*

*Points on the part of the respondents:*

The decree should be affirmed, and the assignment from Stod-

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dard to Thurber and Townsend should be declared fraudulent and void, for the following among other reasons :

1. Because the assignment is absolute, and makes no provision for the payment of other creditors, after payment of the debt of Thurber and Townsend. *Beck v. Burditt*, 1 *Paige*, 309.

2. It is not in full payment and satisfaction of the debt of Thurber and Townsend, but only *for and towards* the payment of that debt.

3. Because an unreasonable amount of property and debts to pay the appellants, Thurber and Townsend, is assigned. *Beck v. Burdett*, 1 *Paige*, 309. *Rob. Fraud. Con.* 547, *n. b.* and cases cited. *New. Cont.* 371.

4. Because it necessarily results from the above, that, even if it be conceded that *in part* the assignment may have been for good consideration, yet, as to the *remainder*, it was a mere *voluntary gift*, and consequently void ; and it is well settled that a conveyance void in part by statute is void *in toto*. 5 *Cowen*, 547. 4 *Paige*, 24.

5. If not deemed void, by reason of the *voluntary gift*, as above stated, the enormous excess of value conclusively implies "a secret trust and confidence" for the assignor, and for this reason the assignment is void. 2 *R. S.* 135, § 1.

II. The property and debts mentioned in the assignment were suffered by Thurber and Townsend to remain in possession of Stoddard, and to be sold, collected, kept, used and controlled by him, and for that reason the assignment is fraudulent and void, as to the respondents. 2 *R. S.* 70, § 5, 2d ed. *Id.* 72, § 1. *Cunningham v. Freeborn*, 3 *Paige*, 564 ; affirmed in *Court of Errors*, 11 *Wendell*, 251, 2, 3, 4. *Randall v. Cook*, 17 *id.* 53, and cases cited. 2 *id.* 599. 1 *Esp.* 205. 1 *Campb.* 332. 4 *Johns. R.* 598. 2 *Wendell*, 449. *New. Cont.* 371. *Rob. Fraud. Con.* 547.

III. The whole spirit of the statute of frauds, and the whole policy of the law forbid that this assignment should be upheld.

After advisement, the following opinions were delivered :

By Mr. Justice BRONSON. Within the two and a half centuries which have elapsed since the legislature first came to the aid of the courts for the suppression of frauds against creditors, there has never been a time when this transaction could stand the test of a judicial investigation. The badges of fraud attending and following the sale are plain and decisive, and the respondents, who are judgment creditors of Stoddard, are well entitled to the relief which has been granted by the court of chancery.

1. The assignment was made "for and towards," and not *in satisfaction* of the debt. The appellants allege in their answer that it was taken in satisfaction ; but this is a new gloss put upon the transaction when they were called into court—it is not the language of the written contract.

2. It was a sale of all Stoddard's property ; and the value of the property was nearly double the amount of the debt of the appellants, Thurber & Townsend. The goods included in the assignment amounted to \$435.89, and the debts, excluding all that were either "bad" or "doubtful," to \$878.43—making in all \$1314.32. The debt on account of which the sale was made was only \$675. The appellants are merchants ; they agreed on the value of the goods at the time the assignment was executed, and they cannot now change the character of the transaction by urging that they got only the remnant of a country store. And besides, nothing but argument is offered ; there is not a word of proof that the goods were not of the full value agreed upon by the parties at the time. We are not at liberty to speculate in such a case, but must decide according to the pleadings and proofs. Without going any further, we have here sufficient evidence of a secret trust between the parties, injurious to third persons. The sale was absolute ; the property greatly exceeded in value the amount of the debt, and no provision was made for other creditors. Thurber & Townsend might legally secure a preference to themselves, but they had no right to go beyond that, and stand in the way of others. The assignment was direct-

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ly calculated to hinder, delay and defraud creditors, and was void within the express words of the statute.

3. The sale was made pending a suit brought by the respondents for the collection of their debt. The vendees knew before the sale that the respondents were creditors of Stoddard, and they do not deny that they knew of the pendency of the respondents' action before the assignment was executed.

4. There was no change of possession. The property remained in the hands and under the control of the vendor, and he was permitted to act as owner as fully after the sale as he had done before ; and what is very remarkable, no explanation whatever of this cogent evidence of fraud is attempted in the answer. What we heard on the argument about the probability of bad roads on the 8th day of March, when the assignment was executed, was a matter of argument only ; the appellants have offered no such excuse in their sworn answer. Continued possession in the vendor after an absolute sale of goods, when wholly unexplained, has always been held, not only *prima facie* but conclusive evidence of fraud as against creditors and purchasers. There is no case to the contrary in the books.

But it is said that the vendees made the vendor their agent, and that the possession of the agent is the possession of the principal. This is not a new device to get round the statute ; but if it succeed, this will be a new and most fortunate era for fraudulent debtors. They can place their goods beyond the reach of creditors and still retain the beneficial enjoyment, provided the friend who takes the transfer will declare the vendor his agent. Such an attempt to cheat the law cannot succeed. In *Sands v. Codwise*, 4 Johns. R. 593, the question related to real estate, where possession is much less important than it is in relation to personal property. Yet this court thought it strong evidence of fraud that the grantor continued after the sale to exercise acts of ownership by selling and leasing lots. The remark of Kent, Ch. J. in that case, in relation to the allegation that the vendor acted as the agent of the vendee, is not wholly inappropriate in the case at bar. "The attempt to screen these constant, essential and con-

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clusive acts of ownership, under the authority of an agent, is a shallow artifice, destitute even of the merit of plausibility." There must be an actual and substantial change of possession ; a divided enjoyment, which leaves the vendor to appear to the world as owner, will not answer. In *Paget v. Perchard*, 1 *Esp. R.* 205, the plaintiffs, on taking a bill of sale of a Mrs. Spencer, who kept a public house, put a third person in possession. But it appearing in evidence that the vendor had been permitted to sell liquor in the usual way of her trade, Lord Kenyon held the sale void as against creditors, and nonsuited the plaintiffs. In *Wordall v. Smith*, 1 *Camp.* 332, the assignee put a servant in possession, but the assignor still continued to carry on the business. Lord Ellenborough said, it was a mere mockery to put in another person to take possession jointly with the former owner of the goods. He added, that a concurrent possession with the assignor is colorable. There must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors. These decisions were made under the statute 13 Eliz. ch. 5, which we long since enacted. But we have now a new additional provision on this subject, which ought to be conclusive with those whose business it is to administer, not to make the laws. Our present statute requires, in terms, an "immediate delivery" and an "actual and continued change of possession" of the thing sold. Until this law is repealed, we are not at liberty to say that a mere *constructive* possession in the vendee, and especially one which leaves the vendor to act as owner, will defeat the claims of a *bona fide* creditor.

5. The property was not only left in the possession of the vendor, and he permitted to act as owner, but there was a secret trust between the parties, or one not appearing on the face of the assignment, that the vendor should have the possession, and derive a personal benefit from the enjoyment of the property. The answer states that Stoddard was to act as agent for the vendees and to receive a fair compensation for his services. He acted a little more than three months, and during that time sold goods and collected debts to the amount of only \$122 ; a sum

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which could not be more than "a fair compensation for his services." Practically this was a trust that Stoddard should continue to carry on the business as usual, and put the money in his own pocket.

This transaction exhibits nearly all the signs and marks of fraud which are mentioned in *Twyne's case*, as well as a disregard of the important advice given by Lord Coke on that occasion as to the proper mode of taking a gift or conveyance in satisfaction of a debt. 3 *Coke*, 80.

✓ I have noticed several objections to the validity of this transfer, because they were presented by the case, and I was not at liberty to pass them by. But I desire to examine the transaction a little further, on the single ground that there was no change of possession.

This is not a mortgage ; it is an absolute bill of sale, and continued possession in the vendor is utterly inconsistent with the deed. There was nothing in the nature or situation of the property, or the circumstances of the parties, to prevent an immediate change of the apparent ownership. In such cases it has been held, with great uniformity, both in this country and in England, that the sale is fraudulent and void as against creditors. In *Twyne's case*, 3 *Coke*, 80, which arose soon after the passing of the statute 13 *Eliz.* it was one of the principal badges of fraud, that the donor continued in possession and used the goods as his own ; and Lord *Coke*, in his advice to the donee says : "Presently after the gift, take possession of the goods, for continuance of possession in the donor is a sign of trust." In *Bucknal v. Rolston*, *Prec. in Ch.* 287, Sir Edward *Northey* said, it had been ruled forty times in his experience at Guildhall, that if a man sold goods and still continued in possession as visible owner of them, such sale was fraudulent and void as to creditors, and that the law had always been so holden. The same thing was held by Lords *Kenyon* and *Ellenborough*, in the cases already cited, and was solemnly adjudged by the king's bench, in *Edwards v. Harben*, 2 *T. R.* 585, where *Butler*, J. declared the unanimous opinion of all the judges, that unless possession

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accompanies and follows the deed, it is fraudulent and void. He said the principle never admitted of any serious doubt.

In *Hamilton v. Russell*, 1 *Cranch*, 310, the supreme court of the United States laid down the same doctrine. *Marshall*, Ch. J. said, that fraudulent conveyances, which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented, by declaring that an absolute bill of sale is itself a fraud, unless possession accompanies and follows the deed. Such was also the opinion of *Tilghman*, Ch. J. in *Daves v. Coke*, 4 *Binn.* 265. This rule was somewhat extended in *Sturtevant v. Ballard*, 9 *Johns. R.* 337, and applied to a case where there was an agreement in the bill of sale that the vendor should have possession for three months. The enjoyment by the vendor was not inconsistent with the face of the deed; but *Kent*, Ch. J. said, "Delivery of possession is so much of the essence of the sale of chattels, that an agreement to permit the vendor to keep possession, is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation." The sale was declared void.

The cases in which it has been held that possession in the vendor did not necessarily render the sale void as against creditors, depended upon special and peculiar circumstances. Many of them are collected in a note of the learned reporter to the case of *Bissel v. Hopkins*, 3 *Cowen*, 189. They are cases of mortgages and conditional sales, where possession in the vendor was consistent with the deed, or where there were special and satisfactory reasons growing out of the nature and situation of the property, or the circumstances of the parties, for omitting to change the apparent ownership. They do not conflict with the general rule that an absolute sale without a change of possession cannot be upheld where creditors are concerned.

The distinction taken by the courts between absolute and conditional sales, only served to change the mode in which fraudulent debtors attempted to place their property beyond the reach of creditors, while they still retained the beneficial enjoyment; and mortgages took the place of absolute bills of sale. These



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were sometimes upheld and sometimes they were overthrown ; in some of the cases it was said that fraud was a question of law for the court ; in others, that it was a question of fact for the jury. Some judges were of opinion that continued possession in the mortgagor was only *prima facie* evidence of fraud, while others thought it well nigh conclusive. This state of things rendered the chances about equal that a fraudulent debtor, after all means of coercion by imprisonment were abolished, might set his creditors at defiance with impunity. For these evils a remedy was most wisely, and I think successfully, attempted in the late revision of the laws. The legislature not only re-enacted the statute of 13 *Eliz. ch. 5*, declaring void all conveyances made with the intent to hinder, delay or defraud creditors, 2 *R. S.* 137, § 1, but they made an entirely new provision, covering the whole ground of controversy. 2 *R. S.* 136, § 5. This section abolishes all distinction between mortgages and absolute sales, and places them both on the same footing. It then declares that the sale or assignment, *unless accompanied by an immediate delivery, and followed by an actual and continued change of possession*, shall be presumed fraudulent and void as against the creditors of the vendor. This presumption becomes conclusive evidence of fraud, if the vendee cannot make it appear that the sale or assignment was made in good faith and without any intent to defraud.

Notwithstanding this new and very explicit enactment, the courts have been strongly pressed to go back to the law of personal mortgages, as it stood previous to the year 1830 ; but they have steadily followed the plain and practical rule given by the statute, and held that there must in all cases be a change of possession, unless there be something in the circumstances of the case rendering the change impracticable. This construction, if indeed there be any such thing as construction where the language is unequivocal, is fortified by the seventh section, which expressly exempts from the operation of the rule contracts of bottomry or *respondentia*, and assignments and hypothecations of vessels, and goods at sea, or in foreign ports. These excep-

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as far to prove the extent of the rule which the legislature attempted to establish by the fifth section.

It can take a case out of the operation of this statute, the attempted explanation relate to the possession of the property. Although the sale be made openly before witnesses, and upon good and sufficient consideration, the answer of the statute is, *unless there be a change of possession, the sale shall be presumed fraudulent and void as against creditors*. The statute means as much as this, or it means nothing. Any other interpretation blots out the fifth section, and leaves us upon the re-enactment of the statute 13 *Eliz. ch. 5*. I need not refer to the cases on this subject since 1830. It is sufficient to say, that it is fully settled, so far as the repeated and uniform decisions of the supreme court can settle any question, that there must in all cases, when practicable, be a change of possession, or the transaction cannot stand. Nothing short of such a rule can effectually reach the evil against which the statute was directed; and that rule, as I have elsewhere had occasion to remark, is one of a most salutary tendency. Those who have been most conversant with courts of justice, must, I think, agree in this opinion, and will, I trust, be among the last who will consent to abandon the act of 1830. But it belongs to others to say whether the statute shall be repealed, and I will not trespass upon their jurisdiction.

I am of opinion that the decree of the chancellor should be affirmed.

By Mr. Justice COWEN. *Butler, McDonough & Co.* of Utica, being creditors of Simeon Stoddard, of Lowville, brought their suit against him in January, 1834, and recovered judgment in May term, for about \$700, upon which a *fi. fa.* was issued which was returned *nulla bona*. Pending the suit, on the 8th of March, Stoddard, by bill of sale of that date, sold and assigned all his goods and choses in action, with some trifling exceptions, to *Thurber & Townsend*, of Utica, which sale and assignment were expressed in the bill to be *towards payment and satisfaction*

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dard, and heard of the assignment about the time that it was made. The bill in this case was filed on the 18th *June*. Previous to that time, to wit, on the 21st *May*, the complainants demanded of the defendants, Thurber and Townsend, an assignment of the notes and accounts which they had received of Stoddard, and offered to pay to them the amount due to them from Stoddard, deducting the value of the goods and such moneys as had been paid on the notes and accounts. The defendants, Thurber and Townsend, refused to accede to the proposition, but offered on their part to yield up to the complainants the property assigned by Stoddard, accounting for such portions thereof as had been converted into money, on the complainants paying the debt due to them from Stoddard, with the interest thereof and the expenses they had incurred : which offer was declined by the complainants. The defendants denied all fraud or intent to defraud, or secret trust for the benefit of Stoddard.

The vice chancellor, on hearing the cause on the pleadings and proofs, *dismissed* the bill. The complainants appealed to the chancellor, who *reversed* the decree of the vice chancellor, adjudged the assignment to be *fraudulent* and *void* as against the complainants, and set the same aside. He also directed an account of the goods assigned by Stoddard in the possession of Thurber and Townsend *at the time of the issuing of the complainants' execution*, and of the debts and choses in action assigned which had not been collected *previous to the filing of the bill*, and of the moneys received on account of such debts since the filing of the bill. The following is the opinion delivered by the CHANCELLOR :

“ Upon a careful examination of the answers of the defendants, and the evidence in this case, I think the conclusion of the vice chancellor that the assignment of Stoddard's property was not fraudulent, was erroneous. Independent of the legal presumption of fraud, arising from his continuance in possession after the execution of the absolute bill of sale, I think the amount of property assigned was, at its fair value, much more than sufficient

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to pay the debt due to the purchasers. The case would have been somewhat different, if Thurber and Townsend had taken the property in absolute satisfaction of their debt and at their own risk, or if they had taken an assignment of the property in trust for the other creditors, after securing to themselves a preference in payment out of the same. But as I understand the transaction, the bill of sale to them was absolute, so as to give them the full benefit of all the property and debts assigned, if the amount realized therefrom should be more than the amount of their debt, but to be applied to the extinguishment of their debt *pro tanto* only, if the proceeds of the assignment should for any reason turn out to be less.

As the nominal amount of the goods and debts assigned was more than double what was actually due to Thurber and Townsend, I can see no reason for the making of an absolute sale and assignment of all his property to them without any risk of loss on their part, unless it was upon some secret or implied understanding between the parties to that transaction to keep the surplus from other creditors for the benefit of Stoddard himself. Besides, there never was in fact any change of the possession of the assigned property, until after the issuing of the complainant's execution, as the nominal appointment of the seller as the agent of the buyers to retain the possession and retail the goods and collect in the debts for them, without any visible change in the mode of doing business at the store, was not a change of possession within the intent and meaning of the statute on this subject. The sale must be accompanied by an actual and continued change of possession, as well as a nominal and constructive change, or the transaction will be deemed fraudulent as against creditors. A construction which would allow the vendor or assignor of a store of goods to continue in possession thereof, and to sell them out as the agent of the purchaser, or assignee, would render this statutory provision for the prevention and detection of frauds a mere nullity. For these reasons, the decree of the vice chancellor must be reversed, with costs."

From the decree of the chancellor, the *defendants* below appealed to this court, where the cause was argued by

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lessness or fraud. It is said the claims were numerous, of small amounts, the debtors scattered in their residences, and Stoddard, from his acquaintance with them, better able than any other person to promote either voluntary or forced collections. All this might have been so. It is taken up as but matter of conjecture; and we are still left to suppose that there might have been other men of business at Lowville possessing nearly the same advantages. If the transaction were honest, a little information from Stoddard would have supplied every deficiency in a neighboring agent probably more efficient, and certainly more responsible. No attempt was made to find other depositories or other agents. Stoddard continued in possession some three months, when all the choses in action, as well as the goods, were taken into the actual possession of Thurber and Townsend.

No commissions, no specific compensation for Stoddard's services were stipulated. He was left to keep his own accounts, and made his own deductions for expenses. Nor were the goods, &c. received in *satisfaction*, if we are to take the written recital in the bill of sale as evidence. That states the assignment to have been *for and towards* the discharge of the debt. The legal effect would be only to discharge so much of the debt as Stoddard should pay over; and as between him and his vendees, the expressed purpose could not easily be contradicted.

It was said in argument that the possession was changed to the vendees, within the legal rule, that the possession of the agent is that of the principal. This would be to contradict by construction the words of the statute, which demands an *actual* change. The possession of every vendor after sale is constructively the possession of the vendee; and, at least, the argument furnishes an answer, to the evidence of fraud, which can always be raised, by the parties clothing the possession with a contract of agency.

Taking the history of this transaction from the *answer itself*, it appears to me there is an air of looseness, generality and contradiction about it, at war with the idea that the parties were using Stoddard's means in good faith, and with an honest view

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to the rights of his other creditors. I think they should at least be put to show so much, in order to overcome the stern inference of fraud which the law raises against them. The strength of the presumption is measured by the adjudged cases, the result of which was well expressed by Mr. Justice Bronson in *Randall v. Cook*, 17 *Wendell*, 56: "Where the property is of such a nature that there may be an immediate change of possession that change must be made, or the law will pronounce the transaction fraudulent as against creditors and subsequent purchasers." I have sought in vain, through this answer, for materials which would take the case out of the rule thus laid down. It is true, the answer negatives generally all intent to defraud; but the denial stands by the side of an admitted specific fact, which, being unexplained, the law has in terms declared incompatible with such a denial.

The defendants produced no witnesses, although their answer was put in issue by a replication, and proofs were taken on the part of the plaintiffs. By these, it appears pretty satisfactorily that the available debts assigned were not far from \$900 in gross amount, which, added to the goods as valued by both Thurber and Stoddard, \$435.89, make an aggregate of nearly double the debt they were assigned to satisfy. It is said the price of goods, as fixed by the schedule, is not conclusive. I should, however, think it very indiscreet in this court to conclude against it. Mr. Thurber was a merchant, valued the goods at cost, and swears in his answer that they were correctly valued: so do the other defendants; and this derives confirmation from the witnesses who were examined on the part of the complainants. All is sought to be overturned by the general fact, that they were "the remnant of a country store." We are asked, with emphasis, what merchant would not rather have cash for his debt? To answer the question, we are brought back to the value of the remnant, which is abundantly established by the best evidence; and no one can deny that it is possible for a remnant to be of the value admitted by the parties on oath.

The expenses of collecting the debts were neither averred in

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the answers nor established by other proof. In addition to Stoddard's conceded insolvency, it appears he was dependent for a livelihood on the business which he had nominally transferred, and, added to his own, were the necessities of his family. He might very naturally infer that Thurber and Townsend would have no objection to his retaining the excess beyond their debt; and he was left to regulate that according to the dictates of his own conscience; for they could enforce no collection against him. The offer of Thurber and Townsend, after being threatened with a suit, to surrender the fund on being paid their own debt, was accompanied with the alarming general addition that the expenses they had incurred should also be paid. If such a proposition in any shape were admissible to defeat a right of suit already attached, it could not but be known that the expenses incurred by an agency such as this, might seriously detract from the value of the fund. The surprise is rather that they should have refused to take the goods at their own valuation, with the money already collected, and allow the balance to be managed by persons so deeply interested as the complainants, in making the best of it for the benefit of all concerned.

Admitting that the debt due to Thurber and Townsend is correctly stated in the bill of sale, and that the agency of Stoddard was publicly known, (though there is but faint evidence of the latter,) yet these are slight circumstances when weighed against those of an opposite tendency. Altogether, so far from establishing good faith in the purchase of these goods and choses in action, to my mind the presumption of fraud, arising from Stoddard's possession after the sale, is considerably strengthened by other facts in the case.

My conclusion is, therefore, that the decree of the chancellor should be affirmed.

By Senator DICKINSON. In this cause two leading questions are presented: *First*. Was the transaction between Thurber and Townsend and Stoddard *fraudulent in fact*, designed to hinder, delay and defraud creditors? *Second*. Was it such a transac-

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tion as the *law declares fraudulent*, however honest the intention of the parties? The stating part of the bill filed before the vice chancellor is sufficiently comprehensive to justify the special interrogatories under it. The defendants were required to answer upon oath; and such parts of their answer as are responsive to the bill, in the absence of contradictory proof, must be taken as conclusive evidence. We may then regard the honesty and fairness of the transfer as fully established, for the appellants in their answer severally deny all fraudulent intention and every secret trust.

It is insisted by the respondents that the amount of property transferred by Stoddard to Thurber & Townsend was so grossly disproportioned to the amount of their debt, as to be strong, if not conclusive evidence of fraud, and if we are confined to the mere footings of the figures without looking at the items, the position would seem to be a true one. No principle is better settled than that a debtor, in failing circumstances has a right to prefer one creditor over another; but he cannot convey or place beyond the reach of others, more property than is reasonably sufficient to pay the debt so preferred. But in the application of this rule we should have regard to the real and not the nominal value of the property transferred. The property transferred to Thurber & Townsend by Stoddard was, as appears from all the evidence, the winding up of a very miserable concern. The inventory of goods presents the mere leavings of what was once called an *assortment*, the merest refuse of a country store, amounting, it is true, at fair cost prices, to \$435.89. But what merchant ever sold or expected to sell his entire lot of remnants at cost? The transferred debts amounted in the whole to \$1,219.28. Of this amount \$681.05 were estimated good, \$197.38 collectable, \$96.37 doubtful, and \$234.53 bad. The debt of Thurber & Townsend, to be paid from these goods and debts and fifty dollars cash, was \$725. Whoever has had occasion to wind up a concern of this kind, needs not to be reminded that after deducting the inroads upon his schedule from removals, set-offs, insolvencies, costs of litigation and time and expenses,



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he will not unfrequently find it a hard bargain even if he had received the whole as a gratuity. But in this case we are not left to mere speculation, as to the value of the transferred property. It is admitted by the stipulation of the parties, that before the bill was filed, Thurber and Townsend offered to give up to the respondent all the property and debts they received by the assignment from Stoddard, upon payment of their debt against Stoddard and expenses of taking the property. This offer the respondents refused to comply with, thereby giving their judgment of the value of this property. The respondents allege in their bill of complaint, that the value of the property transferred by Stoddard to Thurber & Townsend is so far disproportioned to their debt against him, that it is evidence of fraudulent intent in the transfer. They ask this court to believe that which, it is very evident, they did not believe themselves. If, as they pretend, the property had been worth enough to pay both debts, or of any considerable value over and above the amount of the debt of Thurber & Townsend, they would have availed themselves of this offer, and not have entered a court of chancery for the mere purpose of vindicating justice. Besides, they would have framed their bill, which they have not done, so as to have, in any event, reached the surplus, after paying the debt of Thurber & Townsend, if they had supposed it was worth preserving. I am therefore clearly of the opinion that the transaction was honest and fair, and without intent to defraud; and that the value of the goods and debts was no greater than was reasonably sufficient to secure, and ultimately pay the debt for which they were pledged.

The question then, which is presented, is one of much interest in the history of our jurisprudence. It early engaged the attention of the courts of England, and has been most fully reviewed in this and in most of the states of the union. The diversity of opinion entertained, not only by the profession but by learned judges, and the supposed contradictory position of authorities, would seem to justify a review of all the leading cases; and I apprehend we shall find less conflict of authority than has gene-

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rally been supposed ; nor has the doctrine been changed, but is now substantially as it always has been since the law of the twelve tables of Rome.

The common law of England upon this subject was based upon the civil law ; and the statutes of 13 and 27 Elizabeth, the first of which referred to *creditors* and the other to *purchasers*, were but declaratory of the common law. The same has been held the common law in this country, and the statutes of Elizabeth were substantially re-enacted here, and with trifling variations, have found their way into our Revised Statutes.

The earliest adjudged case which arose upon the subject of fraudulent assignments was *Twyne's case*, 3 Co. 80. This was a criminal proceeding in the star chamber, against Twyne, under the statute of 13 Elizabeth, for making and publishing a fraudulent gift of goods. One Pierce, being indebted to Twyne and also to C., the latter brought a suit against Pierce to recover his debt, pending which suit Pierce made a secret deed of gift of all his goods and chattels, real and personal, to Twyne, notwithstanding which Pierce "*continued in possession of the goods and some of them he sold, and he shorn the sheep and marked them with his own mark.*" C. prosecuted his suit to judgment and execution ; and the question was, whether the deed from Pierce to Twyne was fraudulent and of no effect. " And it was resolved by Sir T. Anderson, keeper of the great seal, and the whole court of star chamber, that the deed or "*gift*," as it was called, was fraudulent : 1. For the reason that the gift was general, not excepting his apparel or any thing of necessity. 2. The donor remained in possession, and used them as his own, and traded and trafficked with others. 3. It was made in secret. 4. It was pending the suit. 5. The donor's possession was evidence of a fraudulent trust. 6. The deed contains that the gift was made honestly, truly and *bona fide*. This case seems to have been decided upon the ground that the possession of Pierce, treating the property as his own, and trading and trafficking therein, was evidence of a secret, fraudulent trust. This, the court say, is evidence of an agreement that the "*donee should deal favorably*

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*with him in regard to his poor estate"—that it shall not be called bona fide, because it was a sign of trust.*

In the case of *Paucefoot*, who being indicted for recusancy for not coming to divine service, with intent to defeat the queen of what might accrue to her, made a gift of all his goods, for a feigned consideration, and after grave deliberation by all the barons in the exchequer chamber, this conveyance was held to be void.

In the case of *Stowe v. Grubham*, 2 *Buls.* decided by Lord Coke previous to 1656, a distinction was taken between an absolute and a conditional sale, his lordship saying, "when the conveyance is *conditional*, continuance in possession after this shall not be said to be fraudulent, and this is very clear." But in *Ryal v. Rollee*, 1 *Atk.* 165. Mr. Justice Burnet, in construing the statute of 13 Eliz. says, "there is no distinction between *sales absolute* and *conditional*; courts of equity and juries are to consider upon the whole evidence, whether the conveyance was made with a view to defraud or not;" and he adds, "when the goods or deeds have been left with the vendor so notoriously that there could be no design to defraud, this has never been looked upon as fraudulent."

In *Cadogan v. Kennett*, 2 *Cowp.* 435, Lord Mansfield says, "A fair voluntary conveyance may be good against creditors, notwithstanding it is voluntary. The circumstance of a man's being indebted at the time of his making a voluntary conveyance, is an *argument* of fraud. The question, therefore, in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors. The statute ought not to be so construed as to make innocent parties suffer."

In *Leonard v. Baker*, 1 *Maule & Sel.* 255, it was held, that "as the assignment was notorious in the neighborhood, and the creditor claiming had notice of it, it was not void."

In *Watkins v. Birch*, 4 *Taunt.* 823, Lord Mansfield says, "Can we say that a person who has bought goods under an execution may not let them to the former owner of them? No case has gone so far as that."

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Mr. *Shepherd*, in his *Touchstone*, p. 65, commenting upon the statute of Elizabeth, and speaking of deeds of conveyance, says, "All such as are made *bona fide* and upon *good consideration*, are not to be accounted fraudulent by this statute. But if, hanging a suit, a deed is *secretly made* and the vendor continues in possession, it is void."

*Starkie*, in his *Treatise upon Evidence*, says, "When fraud may be collected from the instrument itself, or from the deed coupled with extrinsic circumstances and the situation of the parties, it is a question of law arising from the facts so found; but when it depends upon *intention*, the existence of that intention must be found by the jury. 2 *Starkie's Ev.* 616, 617, part 4.

In *Kidd v. Rawlinson*, 2 *Bos. & Pul.* 58, Kidd bid off Auburn's goods at sheriff's sale, and left them with him. Lord Eldon said, "If Kidd had lent money to Auburn to buy these goods, and had then taken a conveyance of them as security for his debt arising out of the mere act of lending the money, leaving Auburn in possession of the goods, would not have been a fraudulent act." And *Buller*, in his *Law of Nisi Prius*, 258, says, "But yet the donor continuing in possession is not in all cases a work of fraud, as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money."

But the case of *Edwards v. Harben*, 2 *T. R.* 587, decided in the court of king's bench, in the reign of George III. seems to have been invoked as authority for almost every variety of decision upon this subject. This decision has been seriously questioned, both in the court where it was pronounced, and in this country: but if we except the distinction it takes between *sales absolute* and *conditional*, I am unable to discover any thing in the opinion of the court inconsistent with the plainest principles of justice and law. The case has been misunderstood, as well by those who have arraigned it, because of its extraordinary rigor, as by those who have claimed its authority for a principle which it does not contain. It presents the following facts: Mercer was indebted to Edwards, the plaintiff, in the sum of £22 18s. 6d.,

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and also to Harben, the defendant, in the sum of £191. On the 27th March, 1786, Mercer gave to Harben a bill of sale of all his goods, &c. in his house at Lewes, specifying the articles. The bill of sale was absolute on its face, but there was a verbal agreement that Harben might take the goods and sell them at the end of fourteen days, refunding the surplus money. The goods were left with Mercer, but one cork screw was delivered in the name of the whole. The goods remained in the possession of Mercer until his death, which took place 7th April, 1786, and on the day following, Harben entered and took possession of the goods, and sold them under his bill of sale. Edwards prosecuted him as executor in his own wrong. At nisi prius, a verdict was rendered for Edwards, subject to the opinion of the court. In pronouncing the opinion of the court, *Buller*, Justice, cites the case of *Bamber v. Baron*, decided by the same court at a previous term, but which was touching an assignment made for the benefit of such creditors as would sign a deed of composition within a certain time; and says, "In that case, the court were unanimously of opinion that unless the possession *accompanies and follows the deed*, it was fraudulent and void." But in pronouncing the judgment of the court in the case then at bar, he cites the case of *Stone v. Grubham*, with approbation, and says, "The court there held, that an *absolute conveyance* or gift of a lease for years, unattended with possession, was fraudulent, but if the deed or conveyance be *conditional*, then the vendor's continuing in possession does not avoid it, because by the terms of the conveyance, the vendee is not to have possession till he has performed the condition. Now, here, the bill of sale was on the face of it *absolute*, and to take place *immediately*, and the possession was not delivered, and that case makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed, and such possession comes within the rule as accompanying *and following the deed*." And he adds that which

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I trust no one is disposed to controvert : " This cause has been argued by the defendant's counsel, as being a case in which the want of possession is only *evidence of fraud*, and that it was not such a circumstance *per se*, as makes the transaction fraudulent in law ; that is the point which we have considered, and we are all of opinion that *if there is nothing but the absolute conveyance without the possession, that in point of law is fraudulent.*"

The late Chancellor Kent, in his commentaries upon the English cases, 2 *Kent's Comm.* 520, says, " The conclusion from the recent English cases would seem to be that though a continuance in possession by the vendor or mortgagor, be *prima facie* a badge of fraud, yet the presumption may be rebutted by explanations, showing the transaction to be fair and honest, and giving a reasonable account of the retention of possession. The question of fraud, in such cases, is not an absolute inference of law, but one of fact for a jury."

In the case of *Hamilton v. Russel*, 1 *Cranch*, 310, decided in the supreme court of the *United States*, Robert Hamilton executed to his brother, Thomas Hamilton, 4th *January*, 1800, an absolute bill of sale of a slave ; Robert Hamilton continuing in possession. Russel, a judgment creditor of Robert Hamilton, caused the slave to be taken in execution in *July* 1801, and was prosecuted by Thomas Hamilton, who claimed the slave under the bill of sale. No excuse or explanation whatever was given or attempted, and the jury very properly returned a verdict for the defendant. In pronouncing the decision of the court upon a motion for a new trial, the chief justice reviews the leading English cases, adopts the reasoning of *Buller J.* in *Edwards v. Harben*, and concludes by saying, " this court is of the same opinion. We think the intent of the statute is best promoted by that construction ; and that fraudulent conveyances, which are made to secure to a debtor a *beneficial interest* while his property is protected from creditors, will be more effectually prevented, by declaring that an *absolute* bill of sale is of itself a fraud, *unless possession accompanies and follows the deed.*" The statute of *Virginia* construed in this case was the same as the statutes of

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13 and 27 *Elizabeth*; and with the exception of the artificial distinction taken by the court between absolute and conditional sales, which, if it ever existed, has been abolished by the Revised Statutes, the conclusion of the court is in accordance with the principles for which I contend. I admit, most fully, that where there is "*nothing but the absolute conveyance without the possession*, that, in point of law, is fraudulent;" and also, that "*fraudulent conveyances which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, is of itself a fraud*," whether the possession accompany the deed or not. A bill of sale, whether absolute or conditional, intended to secure to the debtor a beneficial interest, and protect his property from creditors, is clearly fraudulent; nor will the fact that the possession accompanies the deed make it honest and *bona fide*.

In *Phetteplace v. Sayly*, 4 *Mason*, 321, Justice Story says, where a party, who is owner, sells personal property *absolutely*, and yet continues to retain the visible and exclusive possession, the law decrees such conduct a constructive fraud upon the public. To be fraudulent in law, it must be such a transaction as is necessarily at war with good intentions and against good faith." But here, again, the abstract proposition only is decided, whether an *absolute* sale of chattels is *prima facie* void, unless the vendee take actual possession; the question, whether the party was not at liberty to explain the reasons why the vendor continued in possession, not being presented to the court.

This doctrine has undergone a most thorough and able review in the state of *Massachusetts*. In the case of *Brooks v. Powers*, 15 *Mass. R.* 244, one Will sold to Brooks a yoke of oxen, continuing in possession. Powers, a creditor of Will, caused the oxen to be seized on attachment. Brooks brought trover, and obtained a verdict for the value of the oxen; and upon a motion by the defendant for a new trial, on the argument of which all the ancient and modern cases were cited, the chief justice says: "It has been contended in this case, that the possession of the vendor of personal chattels after the sale, is conclusive evidence in favor of creditors that the sale was fraudulent; or rather, that

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it is itself a fraud. But we are all of opinion, that although it is evidence of the strongest kind, it is not conclusive. The vendee may, notwithstanding, upon proof that the sale was *bona fide* and for valuable consideration, and that the possession of the vendor, after such sale, was in pursuance of some agreement not inconsistent with honesty in the transaction, hold under his purchase against creditors : and so it has been often decided in this court, as well as in England." In the same court, in the case of *Bartlett v. Williams*; *Pick. 295*, Putnam, J. says : " It is certainly a general rule, that the possession must accompany and follow the deed, and that the possession of the vendor, after the bill of sale, *unexplained*, would render the conveyance void as against creditors. But such a possession may be explained, and may be perfectly consistent with justice."

The same doctrine has been held in *New-Hampshire*. In *Homer v. Lane*, 2 *N. Hamp. R.* Mr. Justice Woodbury says : " In fine, possession of property being retained by the vendor, after a sale, is not *per se* fraud ; but, in the language of Lord Mansfield, being only evidence of fraud, may be explained. The whole circumstances should be submitted to the jury, and from all parts of the transaction, taken together, it should be determined whether the contract of sale was or was not fraudulent in the concoction of it." In *Coburn v. Pickering*, 3 *N. Hamp. R.* 425, Ch. J. Richardson, in delivering the opinion of the court, says : " After a most attentive and careful examination of the books on this subject, we have not been able to entertain a doubt, that the true rule to be deduced from all the adjudged cases is, that where the sale is *absolute*, possession and use of the good afterwards by the vender is *always, unexplained, conclusive evidence of a trust*." In this case all the English cases were cited and reviewed ; and the court, in concluding their opinion, hold, what I believe always has been, is now, and ought hereafter to be the law, viz. " that such possession in the vendor may always be explained ; but if not explained, should be adjudged fraudulent in law." It was further held by the same court, in *Ash. v. Savage*, 5 *N. Hamp. R.* 545, that " where a chattel has been mortgaged, pos-



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session by the mortgagor may in some cases be evidence of fraud, but is never a fraud in law, or conclusive evidence of fraud."

The leading cases in *Connecticut* seem to indicate a more rigid rule than has obtained in most of her sister states, without perhaps intending to carry the doctrine further. They recognize, and I think partially extend the case of *Edwards v. Harben*; but in *Potter v. Smith*, 5 *Conn. R.* 201, Ch. J. Hosmer adopts the reasoning of the supreme court of this state in the case of *Sturtevant v. Ballard*, 9 *Johns. R.* 337.

In *North Carolina*, where this class of cases has been elaborately reviewed, it was held in the case of *Vicks v. Keys*, *Haywood's N. Car. R.* 126, that "The property ought to accompany and follow the deed; but, (says Judge Taylor, in delivering the opinion of the court) I cannot agree that the property going otherwise as to its possession than the deed points out, is absolutely fraud." In *Trotter v. Howard*, *Hawks' N. Car. R.* 322, Judge Hall, in delivering the opinion of the court, after citing the case of *Edwards v. Harben*, says: The statute of *Elizabeth* declares that all conveyances made with intent to defraud creditors shall be void and of no effect; and whether a conveyance comes within the operation of the statute, whether it is made with intent to defraud creditors, or not, is a question of fact, which, under all the circumstances of the case, properly belongs to a jury to decide. It is a matter of fact, and not a question of law."

In *South Carolina*, in the case of *Terry v. Belcher*, 1 *S. Car. R.* 573, in speaking of the rule that possession must accompany the deed, and the difficulty and injustice of maintaining it, the court say: "In other instances the strong arm of the law has been able to enforce the rule for a time, but even this engine becomes powerless when opposed to the will of a whole community, and the rule is only remembered for the injustice it has done; a wise lawgiver should, therefore, enquire whether the rule proposed, even to give effect to a correct principle, is calculated to promote justice and the happiness of mankind. Those who maintain the opposite side of the question, predicate their

argument on the facility for practising frauds through this means, and the difficulty of tracing them out ; and I agree there is much truth and good sense in the argument. But the security is found in a jury drawn from the atmosphere of the transaction, and the suspicion of the law throws the burthen of proof upon the purchaser." After citing a number of cases in support of this doctrine, they conclude : " It is the voice of mankind, repudiating a policy at war with their feelings, and one which courts of justice must respect." The same doctrine was most emphatically maintained in the case of *Smith v. Henry 2, Bailey's S. Car. R.* 119, the court saying, " the jury ought to be charged that possession in the vendor is *prima facie* evidence of fraud, and leave the explanation to them."

In *Tennessee*, White, J. in the case of *Ragan v. Kennedy*, 1 *Tenn. R.* 100, held, " Whether there be fraud or not, the jury must determine from the evidence. The law considers various circumstances as evidence of fraud : as when a bill of sale is made secretly and not in the usual way ; where a suit is pending against the person conveying ; when made by one relative to another, or when the person making it uses the property afterwards as his own, and when a bill of sale on its face is *absolute* and is not followed by a possession of property, it is void."

In *Virginia*, in the case of *Alexander v. Dencale*, 2 *Munf. R.* 341, the district judge held, that " an *absolute* conveyance of personal estate when the party making it retains possession is void as to creditors, even without other evidence of fraud ; though (he says) this appears to be carrying the matter too far, and perhaps agreeable to ancient determination, it would have been better to have considered it as *evidence* of fraud, connected with other circumstances." This decision was sustained and affirmed by the high court of appeals, but it should be borne in mind that there was no explanation offered or given, why the vendor retained possession. In *Snyder v. Gree*, 4 *Leigh's R.* 547, in reviewing this doctrine, the president of the court of appeals says : " Can it be that in these various transactions, so common in the concerns of life, that the purchase is effected with *constructive fraud* ?

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I think not. The mischiefs of the rule would be greater than the fraud at which it is aimed, if it be permitted to insinuate itself into such transactions as these;" and he adds: "On either side there is an evil to be avoided, and the most common transactions of life, and the ordinary cases of personal estate will be trammelled and embarrassed, if our sole care is directed to the protection of creditors and purchasers who ought to protect themselves."

In *Kentucky*, the case of *Wash v. Medley*, 1 *Dana's R.* 269, Chief Justice Robertson says: "The fact that no visible alteration in the actual possession accompanied and followed the deed, cannot be deemed *per se*, fraudulent. It was a fact proper for the consideration of a jury." In *Baylor v. Smithers*, 1 *Little's R.* 112, the court held that on an *absolute* bill of sale, the vendee must take possession, or it would be deemed fraudulent; but if the bill of sale was *conditional*, the question of fraud must be decided by the jury, from the facts of each particular case.

In *Pennsylvania*, the courts seem to have adopted the most rigorous construction of the English rule, which is summed up by Chief Justice Tilghman, in *Danus v. Cape*, 4 *Binney*, 258, as follows: "When the deed contains an *absolute* immediate assignment, it is necessary that the possession should accompany and follow it, otherwise it will be fraudulent under the statute 13 *Elizabeth*, and, indeed, at common law; but when the deed or conveyance is *conditional*, or to take effect at some future time, the retaining of the possession according to the intent of the deed is *not fraudulent*."

In the early decisions of the courts of this state, it was held, that the continuance of the vendor in possession, was only *prima facie* evidence of fraud, and was a circumstance which admitted of explanation. But in *Sturtevant v. Ballard*, 9 *Johns. R.* 337, it seems to be supposed that the rule contended for by the respondent in this case, has been sanctioned. This was the case of a sale by a blacksmith of his tools to a merchant, partly for cash, and partly in payment of a precedent debt; *the bill of sale containing an agreement that the vendor should continue in pos-*

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*session of the tools three months.* The tools were seized by a creditor upon execution. In the contest between the vendee and the creditor, Kent, Ch. J. says, with emphasis: "There is no case which sanctions such a sale as the one in the present instance; for here, *no reason whatever* appears for withholding delivery of possession, and the sale must, *therefore* be considered in judgment of law as fraudulent and void against the creditors." And he adds, by way of conclusion, "We may, therefore, safely conclude that a voluntary sale of chattels with an agreement either in or out of the deed, that the vendor may keep possession, is, except in special cases and for special reasons, to be shown to and approved by the court, fraudulent and void as against creditors. This is clearly not one of those cases, and the defendant is, therefore, entitled to judgment." This case, I apprehend, does not go the length which many seem to have supposed. Chief Justice Kent places the decision upon the ground that "*no reason whatever appears for withholding delivery of possession, and therefore the sale must be considered void;*" and the decision is precisely what the *revised* statutes now declare to be the law. He does not decide, nor assume to decide, what particular facts and circumstances should be proved by way of explanation; but he clearly admits that the possession in the vendor after sale, may be explained, for he proceeds upon the ground that "*no reason whatever*" was shown in that case.

This whole doctrine passed under the able review of the late Chief Justice Savage, in the case of *Bissel v. Hopkins*, 3 Cowen, 166. This cause was argued at great length and with distinguished ability, and most of the ancient and modern cases were cited. The chief justice, in alluding to the opinion of the court in *Sturtevant v. Ballard*, says: "The learned judge no doubt intended to say here, as in *Barrow v. Paxton*, 5 Johns. R. 261, that possession continuing in the vendor, is only *prima facie* evidence of fraud, and may be explained. The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defraud creditors. The possession

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by the vendor of personal chattels, after the sale, is not conclusive evidence of fraud. The vendee may, notwithstanding, upon proof that the sale was *bona fide*, and for a valuable consideration, and that the possession of the vendor, after such sale, was in pursuance of *some agreement not inconsistent with honesty* in the transaction, hold under his purchase against creditors." This decision has been affirmed by the decisions of the same court in *Jennings v. Carter*, 2 *Wendell*, 449, in *Driver v. McLaughlin*, *id.* 596, and in *Hall v. Tuttle*, 8 *id.* 375, in which last case the late chief justice again reviews at length the leading cases, and again declares that "possession by the vendor after the sale, is only *prima facie*, and not conclusive evidence of fraud;" and avers that no case can be found which holds a different rule. *Hall v. Tuttle* arose and was tried before the Revised Statutes took effect, but was argued and decided afterwards; and the chief justice cites the provisions of the Revised Statute applicable to the question, and declares that the provisions are the same as those of the statute of 13 *Elizabeth*, which statute was declaratory of the common law.

In a learned note annexed to the case of *Bissel v. Hopkins* by the reporter, now Mr. Justice Cowen, it is said, "The details or circumstances which shall constitute a fraud, like those of usury, or the degree of neglect which shall render a man liable in an action on the case, seem to mock the effects of a general rule, and must be ranged forever without the line which divides the province of the court from that of the jury. The law may declare that fraud shall vitiate the sale; but as the devices by which that fraud is to be compassed and disguised may be various, so the evidence by which it is to be established or repelled may frequently vary with the cases as they arise." And, after reviewing the cases at length, the reporter added, "But whichever way the decisions may tend upon the question of possession in the vender, after a voluntary, direct and *absolute* bill of sale, so far as the statute of *Elizabeth* is concerned, no doubt can be entertained at this day that a continued possession in the mortgagee of chattels, is not *per se* evidence of fraud."

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I have thus sought to compile all the leading ancient and modern decisions upon this subject, previous to the revised statutes, in the language of the respective courts, for the purpose of exhibiting in a condensed form, what the law has been ; and of correcting by force of authority, the belief that the courts have ever entertained a rule, which in its application must always be harsh and inequitable—or that they have attempted to overrule a principle which, in my judgment, ought to set all human authority at defiance. The supreme court in some recent decisions have, I am compelled to admit, virtually established, or sought to establish, a new and, I may add, severer rule for their government ; but whether it is sought to be maintained by the current of authority, or by some supposed new provision of the revised statutes, does not very clearly appear. I have already shewn what the law has been ; and if, as I have supposed, it has not been essentially changed by the operation of the revised statutes, it seems to me clear that the reasoning of the supreme court in the cases of *Doane v. Eddy*, 16 *Wendell*, 522, and of *Randall v. Cook*, 17 *id.* 54, (both of which are cited by the respondents' counsel,) are not upheld by the sanction of authority. In the case of *Doane v. Eddy*, the case of the travelling preacher, although the mortgagee offered to prove at the trial that the mortgage was given for a valuable consideration, in good faith, and without intent to hinder, delay or defraud creditors, and offered as explanation why the mortgagor retained the possession, that he was a circuit or travelling preacher of the gospel, and that the horse, the subject of controversy, was absolutely necessary to the prosecution of his calling, yet the plaintiff was nonsuited upon the trial, and the supreme court, in a learned opinion delivered by Mr. Justice *Bronson*, (the *Chief Justice* dissenting,) refused to set aside the nonsuit, and held that the proof offered was insufficient to justify possession in the vendor, and that such evidence was, admitting all the facts proposed to be given in evidence to be true, *conclusive evidence of fraud*. In the case of *Randall v. Cook*, the only reason given by the vendee why the vendor retained possession was, that the vendor

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wished to *use the horses* ; and this "transaction," says Mr. Justice Bronson, "is fraudulent *in law*—the sentence is written in the statute book, and neither courts nor juries are at liberty to disobey the mandate." The reasons for retaining possession in this case were certainly very slight, and might perhaps be deemed unsatisfactory ; but I can well conceive of cases where even the wish to use property would justify leaving it with the vendor for that purpose, so far as to submit the question of *intent* to a jury. I have been unable to find any sentence in the statute book which virtually condemns without a hearing, which separates conduct from motives, for the purpose of passing judgment upon both, or which executes with its sword before it has weighed in its balances. The statute pronounces judgment only in cases where the mortgagor or vendor continues in possession *without explanation*. The fifth section of 2 R. S. p. 136, is as follows : "Every sale of goods made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or against the creditors of the person making such assignment, or subsequent purchasers in good faith ; and shall be conclusive evidence of fraud, *unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.*" This section of the statute, I apprehend, leaves the law substantially where it found it. It places absolute and conditional sales upon the same ground, and declares possession in the vendor conclusive evidence of fraud, *unless, (or rather) until explained* ; or in other words, it throws the burthen of proof upon the vendee, or person claiming under such sale, to shew "that the same was made in good faith, and without any intent to defraud creditors or purchasers." But this question of *intent* is by no means left for

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the decision of the court, nor is it to be regarded as disputed territory between the court and jury. The fourth section of title third of the same chapter, 2 R. S. 137, declares that "the question of fraudulent intent, in *all cases*, shall be deemed a question of fact and not of law. In addition to this clearly defined intention of the legislature as to the validity of bills of sale or chattel mortgages, when given in good faith and without any intent to defraud creditors or purchasers, it is worthy of remark that the last act passed by the colonial legislature of New-York was to provide for the registry of chattel mortgages, and that the legislature in 1833, with a view to correct abuses, passed an act requiring them to be placed on file in the town where the mortgagor should reside, clearly contemplating that the goods were to remain in the possession of the mortgagor or vendor. While it is certain that the question of fraudulent intent is one of law, where the vendor retains possession and no explanation is offered; it is equally clear that the question of intent, when an *explanation is offered*, is a question of fact. The former is the prerogative of the court, and the latter of the jury. It is only necessary for the person claiming under such sale to shew "that the same was made in good faith, upon sufficient consideration, and without any intent to defraud;" and of the *intent* and *good faith* the jury are the exclusive judges. This "*sentence* is written in the statute book, and *courts* are not at liberty to disobey its mandate." It is undoubtedly the province of the court to pass upon the evidence offered in this as in all other cases, and no further; and when they have instructed the jury that the law pronounces the transaction fraudulent, unless they are satisfied that the evidence rebuts all presumption of fraudulent intent, they have discharged their office, and it is for *the jury* and not for the court to say, whether the transaction was fair and without intent to defraud. The benefits of this salutary rule may be as effectually destroyed by its misapplication, as by refusing to acknowledge its existence. If courts are to acknowledge the abstract principle merely, and then destroy its operation by laying their hands on every transaction which



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would ordinarily come within its provisions, and thus subvert the very spirit and intention of the statute, the sooner it is abrogated entirely, the better. The statute, to my understanding, offers its protection to honesty and fair dealing, in all cases where it is so pronounced by the solemn verdict of a jury; but the rule will prove a delusive mockery, if courts are so to construe the statute as to sweep away the only matter fitted for their consideration. In short, I am unable to discover what power the statute has given the court to determine what particular facts shall or shall not be sufficient evidence of honest intention; nor do I hesitate to declare that any facts, which impress the mind with a conviction that the sale was honest and *bona fide*, and was not designed as a mere trick to cover property for the purpose of defrauding creditors, should be submitted to the jury. While such evidence should be subjected to the severest scrutiny, the jury have a right to pass upon it; and if, against the presumption of law, from the explanations given, they find it honest and *bona fide*, their verdict ought to be conclusive.

Neither the legal nor the moral code should be administered for the sole benefit of creditors. They become creditors by their own volition, and have abundant means for their own protection; nor can I consent to place the general creditor, upon a superior footing to him who furnishes his poor neighbor with a cow to nourish his children, or a team to sow his crops or gather in his harvest. If the commercial interest of this country cannot be sustained without trampling upon all others, and the ordinary charities of life besides, the sooner it finds its level the better. It is an idle dream to suppose we can advance the cause of morals, by establishing a rule which ministers to the mercenary passions at the expense of the benevolent affections, or that the fountain of justice will send forth purer streams if they are forced to flow through artificial channels. The principles of law are but the enlightened and just conclusions of a moral people, pronounced by their own tribunals, and when the law seeks to erect a standard of its own, and ceases to exert its attributes in administering to the public good, the same hand which upholds it will not fail

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to divest it of its power to oppress. It will then be seen, how utterly unavailing is the attempt to divide honesty into chapters, or to define morality by sections. Sacred scripture has declared that the poor we shall always have with us, and charity to our fellow men is therein strongly inculcated; but whether the doctrine under consideration is calculated to give force to this divine declaration, by compelling the affluent to retain their goods exclusively in their own possession, upon pain of forfeiture to a stranger, or to counteract its truth by making the possessor of goods, under all circumstances, the owner, it is perhaps difficult to determine.

If this rapacious principle of law, which sets all motives and intentions at defiance, is to obtain, it should at least lay down some outlines for its own government. It ought to declare how far the owner may safely entrust his chattels from his person before the title steals from him, *volens volens*, by operation of law; and for how great a period of time they may so remain out of his possession, before the title to his property will pass from him. If facts and circumstances are unavailing, and courts are to dispose of this class of cases without the intervention of a jury, a Procrustean couch should be fitted for their reception, and extension or amputation bring them to a common standard.

In *Randall v. Cook*, Mr. Justice Bronson says, "Had it been declared fifty years ago, that if a man conveyed his personal chattels and still kept them himself under any pretence whatever, the transaction should be deemed absolutely fraudulent and void as against creditors and purchasers, it would have saved an incalculable amount of time and money which has been expended in the litigation of questions of this kind; and it would moreover have rendered a most important service to the cause of good morals, by removing all temptation to the numberless frauds which have been committed for the purpose of placing property beyond the reach of legal process." While I acknowledge the force of reasoning adopted by the learned and esteemed judge, I am compelled to remark, that if at the same time the law had laid its interdiction upon all human intercourse as to exchanges

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or purchases of property, the same result would have been produced, and with about equal justice and propriety. If fifty years ago, the law had laid aside its metaphysical subtleties, and revealed itself in its own simplicity and purity—if it had, regardless of form, pronounced appropriate judgments upon honesty and fraud, it would have won more by its justice than it has terrified by its power. There cannot well be two standards of truth and morals—the one for courts of justice and another for the people in their ordinary intercourse. If by the inquisitions of the judicial crucible, a transaction both honest and fair may be alloyed until it is dishonest and fraudulent, by the inverse power of transmutation, a fraud may be refined until it is equivalent to honesty and truth. If truth may become constructive falsehood, by the same rule falsehood may become constructive truth. If the *possession* of personal chattels is, or ought to be, *conclusive* evidence of ownership, it is also, or ought to be, *conclusive* evidence that a person *not in possession is not the owner*. All, then, that remains for the fraudulent debtor to do, who would *conclusively* place his chattels beyond the reach of execution, is to place them in the *possession* of his friend against whom no process has been issued, and it is done.

It was said by counsel upon the argument of this cause that the rule contended for by the appellants would tend to produce and encourage litigation and multiply suits, and for this reason would be upheld by the legal profession; that its adoption would tend to make expense and delay in the collection of debts, while the reverse would be productive of much utility and economy. It may be said with equal propriety that if our system of jurisprudence was exchanged for the arbitrary laws of the east; if our courts and juries were dispensed with, and justice measured out by the nod of the lawgiver, and executed by the baston and bow-string, our administration of justice would be more summary as well as more economical, and the services of the legal profession might be altogether dispensed with.

This being an appeal from chancery, it is our duty as a court of equity, to pass upon both the law and the fact. The law has been

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already discussed, and although leaving the goods in the possession of Stoddard was conclusive evidence of fraud until explained ; when it was explained it was so no longer. I repeat, I am disposed to regard the *bona fides* of the transaction as abundantly proved by the pleadings, or rather by the answer, which is evidence. It is fully established that the assignment was not made for the purpose or with the intent to hinder or defraud creditors, but in payment of an actual debt, and that the property was left with Stoddard as the agent of Thurber and Townsend for the sole purpose of closing up the business for their benefit, without disguise or concealment. This, in my judgment, ought to satisfy a jury of the fairness and honesty of the transaction, and that the assignment was not made for the purpose or with the intent to hinder or defraud creditors, which under the view I have taken is all that is necessary. I discover nothing in this matter at war with law, equity or good morals ; I am, therefore, for reversing the decree of his honor the chancellor, and of affirming the decree of the vice-chancellor of the fifth circuit.

By Senator VERPLANCK. The history of our law respecting the rights of creditors in relation to the property of their debtor, sold, assigned or mortgaged by him, but remaining in his possession and under his control, is remarkable. It presents a perpetual struggle between a general rule of policy, intended to cut off the possibility of fraudulent or collusive sales, prescribing either legislatively or judicially that every sale, assignment or mortgage, unaccompanied by change of possession, should be held fraudulent in the eye of the law, and void against creditors ; and on the other side, the obvious hardship and injustice of numerous particular cases where the innocent and even benevolent intention of the party was manifest, and the legal presumption of fraud appeared inequitable, oppressive, contrary to the truth of the case, and the moral feelings of those who must apply and enforce the law. Thus it happened here and in England, that whilst the courts and the books laid down the rule broadly, and often applied it strictly, that "unless possession accompanies and

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follows the deed, it is fraudulent and void," (in the words of Justice Buller, *Edwards v. Harben*, 2 T. R. 587, adopted and incorporated in our own statute,) yet first, case after case, and then class after class of exceptions was exempted from the rule, until with us there were no less than twenty-four distinct grounds of exemption ; such as the kind of sale, purchase under execution, or distress for rent, necessity, convenience, the custom of trade, the distance or situation of place, the relation of parties, motives of humanity or of friendship, and special circumstances of various kinds more or less definitely defined, all enumerated by Judge Cowen, 3 Cowen, 190.

In the revision of our own statute law, it was attempted to settle all these doubts and discrepancies by positive legislation and strict definition. Accordingly, the learned revisers, returning to the strict policy of the old law, and the doctrine laid down in *Edwards v. Harben*, recommended that "all sales or mortgages not accompanied by an immediate delivery, and followed by an actual and continued possession, should be void against the creditors of the vendor," and this without any exception, and excluding all explanation. See *Revisers' Report*, 3 R. S. 657, 2d ed. But the same considerations of natural equity which had so often induced courts to break in upon the legislative and judicial rules of legal policy, had again equal weight with the legislature, so that in adopting the section recommended by the revisors, they added at the end a clause of exception, enabling the person claiming under the sale or assignment, to rebut the legal presumption of fraudulent intention by positive evidence of the good faith of the transaction. It was accordingly enacted first, nearly in the strong and comprehensive language of the revisers, that every sale of goods and chattels, and every assignment by way of mortgage or security, "unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, shall be pronounced to be fraudulent and void as against creditors or subsequent purchasers, and shall be conclusive evidence of fraud." Then the legislature, of its own motion, added the excepting and

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qualifying clause, "unless it shall be made to appear on the part of the person claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers." This question of fraudulent intent, a subsequent section enacts, shall be a question of fact, and not of law; which is a legislative declaration of what has of late been judicially held to be the sound law. These enactments were thought to have settled the law conclusively, and so they appear to have been considered by Chancellor Kent, in his Commentaries, who, after giving the history of the fluctuations of legal decision, adds, "The New-York Revised Statutes have put this vexed question at rest, as to the effect of non-delivery on sale or assignment. 2 *Kent's Comm.* 529. But this legislation has merely afforded a new and remarkable proof of the imperfection of human language, and the impossibility of definitely settling any great rule of law for the complicated affairs of human life, merely by the general language of a statute, or the provisions of a code. ✓

The volumes of our reports, and still more, the actual litigation of our inferior courts, and the doubts and difficulties of men of business, as well as of their professional advisers, give ample demonstration that the law, clearly as it would seem to be enacted, is still fluctuating and doubtful. The decisions in this state since the statute of 1830, have, it seems to me, been more in the spirit of the learned revisers than in that of the enacting sovereign power. They have, I think, gone to lay down legal rules, necessarily general and artificial, to govern the decision of the particular question of intent which is expressly declared to be one of fact; and they have tended to confine the qualifying and excepting clause of the statute, allowing exculpatory evidence, to the narrow limits of absolute necessity of continued possession. As between the official revisers and the revising legislature, this was an open question. The revisers were induced by considerations of public policy, to propose a strict and undeviating universal rule, which would exclude all possible fraud, even at the expense of occasional hardship and severity

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towards innocent parties. The legislature endeavored to adopt that rule with such a modification as might prevent its hard and inequitable operation in special cases. Weighty arguments and high judicial authorities might be urged for either view of the question. But these are no longer applicable. It is not the question of legislative policy that the courts have now to examine, but that of pure statutory interpretation. Upon this, the older decisions may throw some light; but the history of the enactment itself is a surer guide to the meaning of the legislature, if indeed it has not been clearly expressed in the language of the statute. As the decisions on the statute of 1830, are all recent, not yet wrought into the body of our law, nor familiar to the knowledge and practice of men of business, and as none of them have been made or adopted in this appellate court, I shall not consider them in detail, but am satisfied to consider the subject as *res integra* here, and to examine the statute as it stands in the books, without considering the late decisions of our own courts as of binding force, and regarding the older ones as important, chiefly as they point out the intention and explain the language of the statute.

The language of the statute has something of contradiction, indicating the double parentage of the two portions of the section, and this may explain the fact of the very different interpretation given to it by learned judges from that of the mass of business men who are to be governed by it. The absence of a change of possession, it is said, "shall be presumed fraudulent, and to be conclusive evidence of fraud." Now a conclusive presumption is defined to be, "a legal rule not to be overcome by any evidence that the fact is otherwise;" like the presumption of payment, for instance, under our statute of limitation. No contradiction or explanation is admissible, or if admitted would be of any avail. It is the *presumptio juris et de jure* of the civilians which in their language, "*probationem contrariam haud admittit*;" and such was probably the meaning of the revisers. But as the law was actually enacted, it goes on expressly to allow that the only conclusive presumption in question may be

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repelled by positive proof to the contrary. The presumption of fraud, then, (although from some of the language of our courts, I should think they viewed it otherwise,) must be considered only as a presumption of fact, a legal evidence of fraud, conclusive in the absence of contradictory testimony, but open to refutation. It is only, as Lord Mansfield defined the legal presumption of a grant raised by many years' enjoyment, to be, "such a presumption, that unless contradicted or explained, the jury ought to believe it." Here the whole burden of proof is thrown upon the claimant under the sale, and he must "make it appear" that he acted in good faith. I think the words require that it shall not be a mere matter of inference that he did so act, but that he must give such *external evidence* of good faith in that transaction as its nature will admit. It is strictly under our statute a question of fact, such as a jury may judge of, and must alone do so, if the question comes before a court of common law; and any decision going to substitute an arbitrary rule of general policy or of legal presumption, to the evidence itself, must be unsound. If, then, there be positive evidence of a fair and full consideration paid, of the existence of reasonable motives for not requiring delivery, such as may and do sway honest men—for instance, filial or parental or brotherly affection, or the convenience and usage of business, together with that publicity which excludes the idea of intended evasion of law, or holding out false credit—all the requisitions of the statute seem to me to be fully complied with, in the strictest agreement with its letter, and in perfect conformity with its spirit, intention and policy.

In the present case, Thurber & Townsend, merchants of Utica, received from Stoddard, a village retailer in another county, who was indebted to them, an assignment of the remnants of his goods, and of numerous small outstanding debts due him, of two dollars and upward, "for and towards the payment and satisfaction of said debt." Stoddard was left in possession as an agent to sell the goods, and collect the debts for the benefit of the assignees, for which he was to receive a reasonable compensation. The question now is, whether the assignment be void against a



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subsequent judgment creditor. If it be so, it must either be from the presumption of fraud declared by the statute, or from the excess of value of the goods and debts assigned above the actual amount of the debt due, giving proof of an actual fraudulent intent. The chancellor has decided against the validity of the assignment on both grounds. The vice chancellor, who first heard the case, thought otherwise. I agree with his view of the value of the assigned assets ; \$1200 of debts, more than one-fourth confessedly bad, another part doubtful, and the rest scattered among an hundred individuals or more, about a thinly settled country, some probably subject to set offs, all requiring some trouble and delay, many some actual expense in collecting ; together with \$430 worth of goods, the refuse of an old stock valued at cost, not at New-York, but at prices at a secondary neighboring market, and goods too which would scarcely bear the expense of transporting to a place where they might be sold with less trouble and delay, might well be considered as hardly an equivalent to discharge a cash debt of \$635. I assent to all the reasoning of the vice chancellor on this point as conclusive. Besides the offer of the appellants before suit to give up the property on payment of the debt, which was rejected, shows the estimate placed by all parties on the property assigned. On them, at least, it ought to be conclusive. Nor is the very trifling amount of goods sold and debts collected by the agent during three months, a slight additional circumstance to show the difficulty of realizing the assigned assets.

Secondly. As to the legal presumption of fraudulent intent prescribed by the statute : I conceive the evidence of such intent arising from want of a change of possession to be repelled : 1. By the legality of the assignment *per se* for a *bona fide* debt, of assets of doubtful value, though of a nominal amount, exceeding that of the debt for which they were assigned. 2. By the strong proof of the publicity of the assignment, and of the employment of Stoddard as a mere agent, as appears in the cross-examination of the witnesses. Such publicity has always been held one of the strongest evidences of good faith, even from the time of Lord

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Coke, who in *Twyne's case*, when this principle of constructive fraudulent intent was first asserted, points out a secrecy as a mark of fraud, and publicity as the first precaution to be used in order to protect a *bona fide* assignment in satisfaction of prior debts. 3. By the necessity of the case ; the leaving the goods in Stoddard's possession, and the debts to be collected by him, for a time, being apparently essential to the realizing of any considerable amount from them. An agent at Lowville was necessary, and he was probably the best.

From all these considerations, I think the appellants have given the external proof required by law to repel the presumption of fraud, and have made it appear "that the transaction was in good faith, and without any intent to defraud creditors or purchasers." I am therefore of opinion that the vice chancellor was correct in dismissing the complainants' bill, and that the decree of the chancellor should be reversed.

Senator Young expressed his full concurrence in the views taken by the judges of the supreme court, who had just delivered opinions. He considered the question presented in this case as highly interesting, bringing under consideration what transfers shall be deemed fraudulent and what fair, not only in respect to creditors, but to the community at large, who may by false appearances be induced to part with their property, and then defrauded of their dues. He deemed the question important, also, in the view of public morals. He said, sympathy for the poor and unfortunate had been invoked, and the feelings of humanity appealed to, but he said it would be false sympathy and squeamish humanity to support, as legal, transactions like this, so well calculated for the perpetration of frauds. The case under consideration, he said, would not have stood the test of judicial enquiry as long since as 250 years ago, when *Twyne's case* was decided. Then the proportion of personal in comparison with real property was small, commerce was limited, and imprisonment for debt allowed ; and yet in that case, in many respects, not more strongly marked with fraud than the present, the sale was ad-

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judged void. If such was the law then, surely it should not now be relaxed, when so great a proportion of the property of the country consists in personalty, and commercial transactions pervade the whole community, when imprisonment for debt is abolished, and even a certain portion of the debtor's property is exempted from execution. The extent of traffic in the country, and the state of the laws as between debtor and creditor, give facilities to the perpetration of frauds ; and as those increase, the laws intended for the protection of the honest portion of the community should be more rigorously enforced. For these reasons, he was for an affirmance of the decree of the chancellor.

On the question being put, *Shall this decree be reversed ?* the members of the court divided as follows :

*In the affirmative :* Senators DICKINSON, FURMAN, HAWKINS, HULL, HUNT, HUNTINGTON, N. JOHNSON, JONES, LEE, H. A. LIVINGSTON, NICHOLAS, VERPLANCE—12.

*In the negative :* The PRESIDENT of the Senate, Mr. Justice BRONSON, Mr. Justice COWEN, and Senators EDWARDS, HUNTER, E. P. LIVINGSTON, PAIGE, SPRAKER, STERLING, TALLMADGE, WAGER, YOUNG—12.

Whereupon the decree of the chancellor was AFFIRMED.

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WALLER, *appellant*, and HARRIS, *respondent*.

To entitle a creditor to *redeem lands* sold under execution; the requirements of the statute, as to the evidence to be produced by him showing his *right* to redeem, must be strictly complied with; and accordingly, where a creditor omitted to produce, within the time prescribed by the statute, *a copy of the docket of the judgment* under which he claimed to redeem, IT WAS HELD, that though a deed was executed to him by the sheriff, that his title was defective, and that a bill in equity filed by him to *redeem* the premises sold under a *foreclosure of a mortgage by advertisement* could not be sustained.

It was further held, that though the money paid by the creditor in his attempt to redeem, was actually paid over and received by the original purchaser at the sheriff's sale, that such facts were unavailing where it appeared that the money was received by the purchaser under a *misrepresentation* that the requirements of the statute had been complied with, and that the original purchaser had offered to refund such money.

It seems, that the defence set up in this case would not have been allowed had it been objected to in due time; that the purchaser at the sale ought to have applied to the court from whence the process issued, or filed a cross-bill in chancery, to avoid the sheriff's deed—but having litigated the question of the validity of the deed in the courts below, it was held that the grantee was not at liberty in the court of *dernier resort*, for the first time, to raise the question.

APPEAL from chancery. The appellant filed a bill against the respondent before the vice chancellor of the fourth circuit, to *redeem* a lot of land sold under a *foreclosure of a mortgage*, executed by one *Daniel Mason* to *William Stevenson* in the year 1824, of which the respondent had become the assignee, and which was foreclosed by her. The title set up by the appellant as the foundation of his right to redeem was a *sheriff's deed* of the premises, executed to him on the 5th November, 1833, under this state of facts: On the 12th July, 1825, one *Calvin Barker* obtained a judgment against *Daniel Mason*, the above mortgagor, and another person, on which an execution was issued, and the premises in question sold at public vendue on the 25th day of *July*, 1832, and struck off to the respondent for the sum of \$801, the amount due on the judgment on the day of sale. On the 25th day of *October*, 1833, (*fifteen months* after the day of sale,) the appellant called on the sheriff and

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claimed the right to redeem the property. He delivered to the sheriff an *affidavit*, setting forth that he held a judgment in his own name against *Daniel Mason* and another person, docketed 10th February, 1832, on which he claimed the sum of \$681.85 to be due; and also delivered to the sheriff an execution which had been issued upon such judgment, and paid to him for the benefit of the respondent the sum of \$871.09, the amount of her *bid* at the sale of the property, by virtue of the execution in favor of Barker, and the interest thereof. On the *next day*, i. e., on the *twenty-sixth day of October*, the appellant delivered to the sheriff a copy of the docket of the judgment under which he had on the preceding day claimed to redeem. On the 30th October, the money paid by the appellant to the sheriff was received from him by an agent of the respondent, who on the 1st November paid over the same to the respondent. Previous to receiving the money from the sheriff, the agent of the respondent enquired of him whether a *certificate of the docket of the judgment* of the complainant had been delivered to him, and was informed that it had been delivered; but the *time* of the delivery was not stated by the sheriff. Subsequently, however, it was discovered that though a copy of the docket of the judgment had been delivered, it was not delivered until the *twenty-sixth day of October*, and the respondent thereupon offered to *refund* the money received by her from the sheriff, which the appellant refused to accept.

The premises were sold under the mortgage on 31st *January*, 1833, and bought in by an agent of the respondent, and on the same day the title, by virtue of such sale, was vested in the respondent. On the *eighth day of November*, 1833, the appellant *tendered* the amount due upon the mortgage on the day of sale, together with the interest thereof, and the costs of foreclosing, in full payment and satisfaction; which money thus tendered the respondent refused to accept. Twelve days thereafter, the appellant filed his bill to redeem. The vice chancellor decreed a *redemption* of the mortgaged premises; which decree on appeal was *reversed* by the chancellor, and the bill dismissed with costs.

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Whereupon Waller, the complainant below, appealed from the decree of the chancellor to this court, where the cause was argued by

*A. Taber*, for the appellant.

*J. Holmes & S. Stevens*, for the respondent.

After advisement, the following opinions were delivered :

By Chief Justice NELSON. Although this case is quite voluminous, and the points presented somewhat diffuse, it involves but a single question : and that is, whether Waller, the appellant, entitled himself to the benefit of the purchase of the premises under the judgment in favor of Barker, and consequently to the sheriff's deed, by virtue of his attempt to redeem on the 25th October, 1833 ? If he did, he acquired the interest of *Mason*, the mortgagor, in the premises, and of course the equity of redemption, and is entitled to pay off the mortgage, for the purpose of so far disencumbering his estate. If he did not effectually redeem, and failed to acquire the interest of *Mason*, then the respondent having by virtue of her purchase become entitled to all the estate that *Mason* had in the premises, she of course had possessed herself of the equity of redemption, and the appellant had no right to redeem the premises from the effect of the sale under the mortgage.

The idea that Waller may still redeem the mortgage, notwithstanding *Mrs. Harris* took the interest of *Mason* under the Barker judgment, is altogether fallacious. After that, he is a stranger, for his judgment being younger, is no longer a lien on the premises ; all the estate of *Mason*, (the defendant in the judgment,) on which it could attach, having passed out of him to *Mrs. Harris*, by title paramount. I am aware it was said that *Mrs. Harris* lost the benefit of her purchase by subsequently foreclosing the mortgage, and that for that reason Waller's judgment comes in next to it ; and as the foreclosure is not conclusive upon judgment creditors, he thus makes out his right. This view is certainly ingenious, and if we are bound to yield to it,

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will operate successfully, through the forms of law, to cheat (if I may be allowed the term) Mrs. Harris out of the purchase money paid on the sale under the execution, for the benefit of a junior judgment creditor. But the law is subject to no such reproach. After the sale under the execution, Mrs. Harris bought in the mortgage, and took an assignment; thereby possessing herself of both the interest of the mortgagor and mortgagee; the foreclosure, therefore, was a work of supererogation as regarded junior liens on the equity of redemption. The whole estate had been swept from under them, and vested in her by title paramount. It is true that her title to the equity of redemption under the sale upon the judgment was inchoate, and has been intercepted, if the appellant can maintain his deed from the sheriff, but if not, as she was entitled to it, on the 25th October her right became perfect, and related back to the day of the sale; and on that day, in judgment of law, she was the owner of this equity. The question, therefore, in any legal view of the case, is narrowed down to the redemption of the sale under the Barker judgment.

Now it must be borne in mind, that *redemption of lands* under execution, is a creature of the statute, 2 R. S. 370 to 374, unknown to the common law, and hence it is obvious we must look to its provisions alone for the steps necessary to acquire a right under it. Before the act of 1820, *Sess. Laws*, 167, the purchaser was entitled to his deed on payment of the purchase money, by which the title passed absolutely. By that act, a system was devised which in effect extended a credit of fifteen months to the judgment debtor from the sale; and within which time he, or any assignee of his interest, or any junior judgment creditor, at the respective periods designated in the statute, upon complying with certain conditions therein prescribed, might redeem the purchase and take the deed. The act did not prescribe the evidence of the existence, amount, or ownership of the judgment under which the redemption was sought. The right was put upon the facts, i. e. 1st. The ownership of a junior judgment, which was a lien; and 2d. The payment of the

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money within fifteen months. Upon this being shewn, the right followed. In 1 *Cowen*, 443, the court suggest that an exemplification of the judgment would be proper evidence ; but in 4 *id.* 420, whether such evidence need be produced or not, is made to rest in the discretion of the sheriff. To guard against the abuse that might grow out of the arbitrary exercise of this discretion, and establish a fixed rule by which parties could act understandingly in the steps to be taken, the statute, 2 R. S. 373, § 60, provides, that, "*To entitle any creditor to acquire the title of the original purchaser, or to become a purchaser from any other creditor, pursuant to the foregoing provisions, he shall present,*"

1. A copy of the docket of the judgment under which he claims, &c.; 2. A true copy of all assignments, verified by affidavit ; and 3. An affidavit of the true sum due on the judgment, &c. If any meaning or effect is to be given to this section, proof of the ownership of the judgment and payment of the money is not enough ; because it declares that to *entitle the creditor to acquire the title of the purchaser*, pursuant to them, he must, in addition, furnish the aforesaid evidence ; this seems to be made in terms as imperative as the *existence* of the judgment, or payment of the money. This conclusion is also greatly confirmed by recurring to the consideration before stated, i. e. that this proceeding is a creature of the statute ; a complete system of itself, and a strict compliance with all the requirements is essential, upon well settled principles, in order to claim a benefit under it. I know that statutes are sometimes construed to be only *directory*, and then latitude is allowed ; but it is otherwise where the provisions are *peremptory*. If we also recur to the defect of the law of 1820, and the danger of abuses under it, through the partiality and favoritism of the numerous officers charged with its execution, we are strikingly admonished against frittering away, by doubtful construction, this salutary check. Our bias should incline in favor of regulating discretion, and of adhering strictly to a provision which will enable all parties in interest, and officers to act understandingly in either claiming or dispensing its benefits.



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The reception of the money cannot, I think, under the circumstances, prejudice the rights of the respondent. I am, therefore, in favor of affirming the decree.

By Mr. Justice BRONSON. If the appellant failed to effect a valid redemption from the sale under the Barker judgment, there is no ground on which he can maintain a claim to redeem from the mortgage. The sale on execution transferred all such interest as Mason, the debtor, had in the land at the time the judgment was docketed; and when at the end of fifteen months the sale ripened into a title, it necessarily destroyed the lien of all junior incumbrances. The lien of the appellant's judgment was at an end, and from that time he was a mere stranger, having neither right nor interest to redeem from the mortgage.

The fact that there had been a statute foreclosure of the mortgage and a purchase under it by the respondent within the fifteen months, cannot alter the case. That proceeding barred the equity of redemption of the mortgagor, and all persons claiming title under him; but those who had obtained judgment liens on the mortgaged premises were not affected, 2 R. S. 546, § 8. The Barker judgment and the sale under it were as little prejudiced by the foreclosure of the mortgage as was the judgment of the appellant. Notwithstanding the foreclosure, both judgments continued to be liens on the property until a title was perfected under the first, and then the lien of the junior judgment was extinguished. The appellant must therefore rest his case, as he does in the bill, on the ground—not that he is a judgment creditor merely—but that, being a judgment creditor, he redeemed from the sale under the Barker judgment, and thus acquired the title or equity of redemption of Mason, the mortgagor and judgment debtor.

This brings us to the real question in the cause. Was there a valid redemption from the sale under the Barker judgment? The appellant delivered to the sheriff an execution which had been issued on his judgment, but did not present a copy of the docket. The statute declares, that to entitle a creditor to redeem he shall present to and leave with the officer who made the sale,

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*a copy of the docket of the judgment* under which he claims, duly certified, &c. 2 R. S. 373, § 60. The language is too plain and explicit to admit of two interpretations. The provision is, not that the creditor *may*, but that he *shall* present a copy of the docket. It is not in the alternative, allowing a copy of the docket, *or some other satisfactory evidence*. It is not a mere *direction* to the officer, but *a qualification of the right of the creditor*. He must not only have a judgment, but *to entitle* him to redeem he must present the specified evidence. There is no room for construction ; and I do not see how we can hold this a valid redemption without repealing the statute.

The act of 1820 did not prescribe the evidence to be produced by a creditor claiming the right to redeem. The consequence was that this matter was left, in a great degree, to the discretion of the sheriff and his deputies. Different officers were at liberty to adopt different rules of proceeding ; and the same officer might sometimes receive, and at other times reject the same kind of evidence. Besides leaving the parties in doubt and uncertainty about their legal rights, a wide door was left open for favoritism and injustice. To remedy these evils, the legislature, in 1830, specially prescribed the evidence which should be presented by the creditor ; and thus made the rights of the parties depend, not on the discretion of the officer, but on the law of the land. That this was a salutary provision can hardly be doubted ; but if it were otherwise, the remedy belongs to another branch of the government.

In referring to precedents to show how large a license had sometimes been taken in the construction of statutes, the appellant's counsel remarked, that there were subjects of legislative regulation where no one, from reading the statutes, could even guess what was the actual state of the law on those subjects. There is too much truth in this remark. But if the courts have sometimes gone very far towards taking the place of law-makers, it is but justice to say, that of late years they have been striving, both here and in England, to get back again into their appropriate sphere of action. Except in relation to a few old statutes

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which were long since overwhelmed by commentaries and decisions, the current of authority at the present day is in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending their operation. Courts cannot correct what they may deem either excesses or omissions in legislation, nor relieve against the occasionally harsh operation of statutory provisions, without the danger of doing vastly more mischief than good. Let us take, for example, the statutes of frauds and of limitations, which have filled our books with legal adjudication. Had the plain and unequivocal language of those laws been rigidly followed, there would undoubtedly have been a few cases of great hardship ; but when it had once been settled that the statutes were not to be limited in their operation by over refined and artificial interpretations, men would have been able to understand and govern themselves by the law of the land, and an incalculable amount of legal controversy would have been avoided.

In the case at bar we are asked to go much further than the current of authority, either ancient or modern, will warrant. We are asked to overlook and disregard a new provision introduced into the law of redemptions in 1830, and to construe the the statute just as though the amendment had never been made. There is, I think, no principle upon which we can hold this a valid redemption.

The respondent, by receiving the money which had been paid to the sheriff, did not waive the objection to the sufficiency of the redemption. Her agent acted under the false representation that a copy of the docket had been presented to the sheriff ; and when the truth was discovered she offered to refund the money. It is not material that it was the sheriff, and not the appellant, who misled the respondent ; nor is it important to enquire whether the sheriff was governed by a bad motive. It is enough that the respondent acted upon information on which she had a right to rely, and which proved to be false. Indeed, if nothing whatever had been said, it is difficult to perceive how she could waive or

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consent to forego an objection without knowing that any ground for making it existed.

The regular mode of testing the validity of the redemption was a direct proceeding to set aside the sheriff's deed ; and in this section, where the question arises collaterally, I should have held the deed conclusive of the rights of the parties, if that ground had been taken at the proper time. But the parties have, I think, consented to litigate that question in this section. The invalidity of the redemption was set up in the answer ; both parties have taken proofs on the question, and it has been the principal point of controversy in the cause. Had the appellant excepted to the answer for impertinence on the ground that the validity of the deed could not be questioned in this proceeding, the respondent would then have moved the supreme court, or filed her cross bill in the court of chancery, for the purpose of avoiding the deed. But no exception to the answer was taken. So far as appears, the appellant suffered the cause to proceed to a hearing and a decree in the court below, without any question as to this mode of trying the right ; and now, after a decision against him on the merits, he objects for the first time, and in a court of review, to the form of the remedy. The objection comes too late. We cannot yield to it without working great injustice.

It was said by the appellant's counsel that the sheriff, under the Barker judgment, sold in one lot several parcels of land which should have been put up separately, and that the sale was consequently void. If the objection were well founded in point of fact, and if it could be raised in this collateral proceeding, it is a sufficient answer to it that the question is not made by the pleadings. The appellant in his bill does not attempt any impeachment of the sheriff's sale. On the contrary, he expressly affirms the sale, and claims a title under it.

There is another ground on which the cause might, perhaps, be safely placed. If the sheriff in his discretion might dispense with the proof required by the statute when the appellant came to redeem, equity requires that he should have been equally in-

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dulgent to the respondent. But I forbear to examine that question, preferring to rest my opinion on the broad ground that there was no redemption, and that the respondent has done nothing to preclude herself from making the objection.

I think the decree of the chancellor is right, and that it should be affirmed.

On the question being put, *Shall this decree be reversed?* all the members of the court, 23 being present, voted in the negative.

Whereupon the decree of the chancellor was unanimously **AFFIRMED.**

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**HONE'S EXECUTORS vs. VAN SCHAICK and others.**

A devise of real estate to executors *in trust* to receive the rents and profits, and pay over the same to the children of the testator for the term of *twenty-one years*, is *void*; so, also, a *power in trust* to make partition at the end of such term is *void*. Where, by the same will, the testator gave to each of his grandchildren who should be living at the time of his death the sum of \$5,000, to be paid upon their attaining the age of twenty-one, or marrying, such payment, however, to be subject to the approbation of the parents of the grandchildren, and the time of payment to be fixed by them; IT WAS HELD, that the legacies were vested and not contingent, and that the power given to the parents did not prevent the vesting of the legacies.

The bequest of the legacies to the grandchildren being in itself free from objection, and having no necessary connection with the *trust* adjudged to be void, it was held, that the will in respect to such legacies should be carried into effect, notwithstanding that the trusts created by the will were declared void: this decision is in accordance with *Hawley v. James*, 16 *Wendell*, 61, though not with *Root v. Stuyvesant*, 13 *Wendell*, 257.

**APPEAL** from chancery. The executors of the last will and testament of *John Hone* filed a bill in chancery, before the vice chancellor of the first circuit, against the widow, heirs, legatees and distributees of the deceased, to obtain a construction of the will as to the *validity of the devise to the executors in trust*. In July, 1831, the testator made and published his will, whereby,

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after a specific devise and bequest to his wife, he devised and bequeathed *the residue of all his estate, real and personal*, to his *executors* for the purposes of his will. He directed the executors to convert all his personal estate, with certain exceptions, into cash, and to invest the same in bonds and mortgages or in stock of the United States, to lease his real estate in the city of New-York, and to sell the portion thereof lying out of the city and invest the same in like manner as his personal estate : to the end that the rents and profits, interest and dividends thence accruing might form *one general fund* for the purposes of his will. He then directed the executors to pay certain annuities to his widow and to a niece, and to divide the residue of the income of the fund, from time to time as the same should accrue, equally among his seven children and the descendants of two deceased children. At the *expiration of twenty-one years* from the date of the will, or *as soon thereafter* as the executors should deem it discreet, they were directed to *divide* the real and personal estate among the heirs of the testator or their legal representatives. Special directions were also given as to the manner of making partition and *limiting the extent of interest* of the parties taking the same, so that the *children* of the testator should in no case take more than a *life-estate in the premises*, the ultimate remainder being *limited over* to their descendants or the then heirs of the testator. By a *codicil* made in August, 1831, the testator made a further bequest to his wife, and increased the annuities to be paid to her, and to his niece ; and he gave to each of his *grandchildren* who should be living at the time of his death the sum of \$6,000, to be paid to them respectively upon their attaining the age of twenty-one, or marrying : such payments, however, not to be made *without the approbation* of the parents of such grandchildren to be expressed in writing ; the testator desiring, that, after the child was of age, or married, the parents would fix a discreet and proper time for the payment of the legacies. These legacies were directed to be paid out of the testator's personal estate, and all the residue of the estate, real and personal, was to remain subject to the provisions of the ori-

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ginal will as modified by the codicil. In 1832, the testator died, leaving his widow, seven children and the descendants of two deceased children him surviving.

Upon the hearing of the cause before the vice chancellor, he decreed that the *devise of the real estate* to the executors and all the trusts declared upon such devise were *void*, and the direction to divide or partition the real estate after the expiration of the trust term of twenty-one years was also *void*; but held, that the bequest of \$6,000 to each of the grandchildren was *valid*, and decreed the payment of the same in the manner directed by the testator. This decree, on an appeal to the CHANCELLOR, was affirmed: see the opinion of the chancellor, 7 *Paige's Ch. R.* 230, *et seq.*, where also may be seen a more full statement of the provisions of the will of the testator. A further appeal was taken, removing the proceedings into this court, where, after argument by counsel, and advisement by the court, the following opinion was delivered:

By Mr. Justice BRONSON. Every estate is void in its creation, which is so limited that the absolute power of alienation may be suspended for more than two lives in being at the creation of the estate. The lives must be designated, and *life* must in some form enter into the limitation. No absolute term, however short, can be maintained. The testator attempted, by means of a trust to receive rents and profits, to render his lands inalienable for a term, of which more than nineteen years remained unexpired at the time of his death. This he could not do. The statute had forbidden it. The whole trust estate, and the remainders limited upon it, are consequently void. *Coster v. Lorillard*, 14 *Wendell*, 265. *Hawley v. James*, 16 *id.* 61. The power in trust to make partition at the end of the term is subject to the same objection as the trust. It works an illegal suspense of the power of alienation. That this may be the effect of a power in trust, and that the power will then be void, has been adjudged by this court in the cases already mentioned.

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The testator left seven children, and grandchildren representing two other children, his heirs at law, to whom the estate descended, subject to the execution of the power. They took by descent, not by devise; and whether they will ever take any thing under the will, depends on their surviving the term. The division is to be made among the heirs of the testator, and such persons as may be their legal representatives at the end of the twenty-one years. Several grandchildren of the testator were born between the time of his death and filing of the bill. These and other grandchildren and other more remote descendants of the testator, who were not in being at the time of his death, and who may not be born until the last day of the term, may be entitled to share in the partition. It is evident, therefore, that at no time during the term can such an absolute fee in the land be conveyed as may not be defeated, either in whole or in part, by the execution of the power. It could not be done if all mankind were to join in the conveyance.

In *Root v. Stuyvesant*, 18 *Wendell*, 257, all the justices of the supreme court were of opinion that the power of appointment was valid, although there was a possible mode of execution which the law would not permit. That, however, was a power which the grantees might execute or not at their pleasure. It imposed no duty on the tenants for life; it did not require them to do an illegal act. But this is a special power in trust, and is imperative. It imposes a duty on the grantees, the performance of which may be compelled in equity for the benefit of the parties interested. 1 *R. S.* 734, § 96. The testator has directed such a division and conveyance of his estate at the end of the term as the law has forbidden. Such a power cannot, I think, be upheld for any purpose.

No distinction was made on the argument between the real and personal property included in the trust. 1 *R. S.* 773, § 1, 2.

The only remaining question relates to the bequest of \$6,000, to each of the grandchildren of the testator living at the time of his death. It is said that these are contingent not vested



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legacies; and that the contingency is of such a nature as to work an illegal suspense of the absolute ownership of the property. 1 R. S. 773, § 1, 2. If this were in truth a contingent bequest; if the legatees were only to take on condition that they respectively attained the age of twenty-one years or married, and on the further condition that their parents fixed on a time for the payment of the legacies, there would be no illegal suspense of the absolute ownership of the property. The gift would in that case either vest in each of the legatees at some period during his life, or never vest at all; and the power of disposing of the property could, at the most, only be suspended for a single life.

But I think the legatees severally took a vested interest immediately on the death of the testator. Where, as in this case, there is a present absolute gift, postponing the time of payment to a future day does not render the legacy contingent. *Patterson v. Ellis*, 11 *Wendell*, 259. If the testator had stopped after directing the legatees to be paid upon their attaining respectively the age of twenty-one years or marrying, the legacies would clearly have been vested. The clause which follows requiring the approbation of the parents cannot alter the case. It only provides for a further postponement of the time of payment. The gift is still absolute. The parents of any legatee have no other power over his legacy than that of fixing a discreet and proper time for the payment. A discretionary power of this kind will not prevent the vesting of a legacy. *Churchill v. Speake*, 1 *Vern.* 251.

If the legatees took vested interests on the death of the testator, there neither is nor can be any suspense of the absolute ownership of the property. Although the time of payment has not arrived, there are persons in being who can convey a perfect title to the property, including the right of present enjoyment. If this cannot be done by the legatees and executors together, it certainly may be accomplished by joining with the next of kin to the testator.

Although that part of the will which relates to the trust is illegal and void, it has not been pretended that another inde-

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Hone's Executors v. Van Schaick.

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pendent provision, which is in itself free from objection must consequently be overthrown. The counsel seem to have been agreed that the rule of the common law and of our statute is still in force, and that the intention of the testator, so far as it is consistent with the rules of law, must be carried into effect, notwithstanding the decision of this court in *Root v. Stuyvesant*, 18 *Wendell*, 257. That case is in direct conflict, on this point, with the decision of this court in *Hawley v. James*, and seems only to be regarded as an adjudication between the amicable parties then before the court, and not as a precedent which can affect the rights of third persons.

I have arrived at the following conclusions : The trust to receive rents and profits, and the power in trust to make partition, are illegal and void. The bequest of legacies to the grandchildren, having no necessary connection with the illegal trust, and being in itself free from objection, is valid. These are the only questions which were discussed on the argument, and in relation to each of them I think the decree of the court of chancery was right, and that it should be affirmed.

Whereupon the decree of the chancellor was *unanimously*  
**AFFIRMED.**

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Dyett v. North American Coal Company.

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DYETT and wife, impleaded with others, *appellants* and THE NORTH AMERICAN COAL COMPANY, *respondents*.

The separate estate of a *feme covert* in the hands of *trustees*, is in equity chargeable with debts contracted for the benefit of the estate. So such estate is chargeable where a *portion* of it has been converted into *other property*, in conformity to the provisions of the trust deed, and a debt is contracted for the benefit of such substituted property.

Ordinarily, in a suit in equity against husband and wife, where they unite in the answer, and the answer is *sworn* to by the husband alone, such answer is deemed the answer of the husband only ; but where the suit against them is in respect to the *separate estate* of the wife, and she unites with the husband in *signing* the answer which contains *admissions* of the cause of action *on appeal* the wife will be held bound by such admissions, although the husband alone swore to the answer ; it is then too late to object that she did not swear to the answer.

*It seems*, that where a *feme covert* is proceeded against in respect to her *separate estate*, that though the husband must be made a party defendant, the *subpoena* to answer must be personally served on her, and in all other respects in the conduct of the suit she must be treated as a *feme sole*.

APPEAL from chancery. The respondents filed a bill in chancery, before the vice chancellor of the first circuit, against the appellants and others, asking for a decree subjecting the income of certain *trust property* to the payment of a debt due to them, for a quantity of coal furnished on the order of *Joshua Dyett*, which was appropriated in the carrying on of a *cotton factory*, into which a portion of the *trust property* had been converted. The trust property sought to be charged is a lot in the city of New-York, on which there is a dwelling house erected, and in respect to which a *deed in trust* was executed by *Joshua Dyett* and *Jesse Ann* his wife, to certain trustees in September, 1821. The house and lot belonged to Mrs. Dyett previous to her marriage, and the deed in trust was executed in pursuance of an ante-nuptial contract. The trusts were, that the trustees with the consent and approbation of Dyett and his wife, should sell and convey the premises, and invest the proceeds of the sale either in *other real estate* or in public stocks, and permit Dyett to receive the rents and profits, or income of the trust estate during

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coverture, for the use of himself and wife. In May, 1823, the trustees, with the consent and approbation of Dyett and his wife, executed a *mortgage* upon the house and lot to the amount of \$15,000, in part payment of a cotton factory purchased by them as *trustees*. After the purchase, Dyett and wife went to reside in the vicinity of the factory, and from the income thereof derived to some extent at least their support and maintenance. From 1826 to 1830, one C. M. Livingston had charge of the factory, and managed its concerns as agent, with the approbation of the then sole acting trustee. Dyett residing near the factory, was permitted by the agent to take the superintendence of the factory and its concerns, and in July, 1828, he purchased of the respondents a quantity of coal, which was principally consumed in the business of the factory. He drew on the agent for the price of the coal at sixty days, which draft was accepted by the agent, but not paid at maturity. The factory having been sold in 1830, under a decree of the court of chancery, in a suit prosecuted by one Chapman against Dyett and his wife, the respondents, in 1831, filed their bill against Dyett and wife and the trustees, praying that their debt might be directed to be paid out of the income of the house and lot in New-York. To the bill thus filed, an answer was put in by Dyett and his wife, *signed* by both, but *sworn to* only by the husband. The wife did not appear by guardian, but by attorney. The answer substantially admitted the facts as above stated.

The bill was *dismissed* by the vice chancellor, with costs. The complainants appealed to the chancellor, who *reversed* the decree of the vice chancellor and adjudged the debt due to the complainants, together with the costs in the original suit and upon the appeal, *to be paid out of the income of the trust estate*. See the case more fully stated and the opinion of the chancellor, 7 *Paige's Ch. R.* 9, *et seq.* Dyett and wife appealed to this court, where the cause was argued by

*M. Hoffman & B. F. Butler*, for the appellants.

*J. Blunt & S. Stevens*, for the respondents.

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After advisement the following opinion was delivered :

By Mr. Justice COWEN. I concur with the chancellor., that the debt in question was chargeable upon the wife's interest in the Broadway house and lot. It is plain that the opinion of the vice chancellor would have been the same, had he not felt a difficulty in seeing that the Broadway property and factory made parts of one and the same trust estate. It appears to me that it is impossible to separate them. Originally, to be sure, the marriage settlement was confined to the Broadway property ; but it is not denied that in pursuance of the very deed of settlement, that identical property was made instrumental in the purchase of the factory. A part was taken from the Broadway property and invested in the factory, by the trustees, with the consent of Dyett and his wife, the *cestuis que trust*. The factory, therefore, in the eye both of law and equity, became substituted for that portion of the Broadway property which was deducted in order to the purchase. In legal effect, it became a part of the Broadway property, subject to the same trusts, and to be read as a part of the original deed. *Taylor v. Plumer*, 3 *Maule & Selw.* 562, 575. In this sense the coal, being purchased by Mrs. Dyett for the benefit of the factory, is but another mode of saying that it was for the use of the original trust property, the house and lot itself.

I have supposed that Mrs. Dyett made the contract for the coal. I am aware that this is denied, and correctly, so far as her personal contract is in question. But the denial is carried farther, by saying that she never assented to the appointment of *Livingston* as agent of the factory, who it is agreed did assume to be agent, and as such to make the contract. It is sufficient, however, that the fact of her assent is not denied, but expressly admitted by the joint answer of Joshua Dyett and herself. It is said that such an answer is not to affect her interests, although she joined in it ; that still it is but the answer of the husband ; and this I agree is, in general, so. I am not aware, however, that the rule has ever been applied to a wife who is sued in

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respect to her *separate estate*. The bill is in the nature of an action at law against her for the recovery of a debt; and, although her person is not liable, she is proceeded against, in respect to her estate, as a *feme sole*. Having an estate, which she is capable of charging by her contract in the first instance as a *feme sole*, it seems to follow that her *admissions*, by way of answer or otherwise, are to be received in evidence against her.

A single woman sued at law may confess the action. Being liable as such in chancery, she may do the same thing as to the bill, and of course may admit any single fact tending to that consequence. Where her separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity, as respects her power to dispose of or charge it with debts, to all intents and purposes as a *feme sole*, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest. *Jaques v. The Methodist Episcopal Church*, 17 Johns. R. 548, 585, and the cases there cited by Mr. Justice Platt. It follows, according to the same case, that she may deal with her husband by granting the estate to him, or appropriating the estate or its income to his benefit. She may, therefore, sue or be sued by her husband, or become a substantial party against or at the suit of others. With regard to the form of proceeding, it is true that she must sue by her *prochein ami*, or her husband may, by her consent, be joined with her against a third person. So he must be made a party defendant with her when she is sued; but he is then merely a formal party; the subpœna must be served, not as in ordinary cases, on the husband alone, but on the wife, and if he be absent beyond the jurisdiction of the court, the formality may be dispensed with and the wife compelled to answer alone. *Clancy's Husb. and Wife*, ch. 11, p. 358 to 365, of *Am. ed. of 1828*, and the cases there cited. 2 Johns. Ch. R. 139. In common cases the subpœna is served on the husband alone, though the suit be against him and his wife; and he then answers for both, *Ferguson v. Smith*, 2 Johns. Ch. R. 139; and according to the late cases of *Hodgson v. Merest*, 9 Price, 556, 563, and *Elston v.*

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*Wood, 2 Mylne & Keene*, 678, the answer amounts to no more, although the wife join in it. In that case an order may be obtained, for good cause, that she answer separately, and she becomes a substantial party to the suit "only from the time of the order." *Jackson v. Haworth*, 1 *Sim. & Stu.* 161, 162. *Carleton v. McEnzie*, 10 *Ves.* 442. Then and then only can the answer be read against her as evidence; and although a joint answer put in by the husband admit the allegations in the bill, they must, according to *Hodgson v. Merest* and *Elston v. Wood*, be proved. In both these cases the admissions in the joint answer were rejected as incompetent, and the decree against the wife proceeded on independent proof. For all this, I can see no reason except that she is but a formal party, a mere cypher, neither served with process, nor appearing, having no copies, notice, solicitor or counsel independent of her husband; every thing passing under his exclusive control. But the practice in such case, says Mr. Hoffman, is "inapplicable where the wife's separate estate is proceeded against. There she must be served with a subpoena personally; and if absent, an advertisement under the statute must be resorted to." 1 *Hoffm. Ch. Pr.* 232. In *Jones v. Harris*, 9 *Ves.* 486, where the wife had not been served, Lord Eldon said "that where the service is upon the husband, not merely seized or entitled in right of his wife, and the plaintiff seeks satisfaction out of the separate estate of the wife, if she is considered a *feme sole* for other purposes, she must be so for that purpose also." In *Lillia v. Airey*, 1 *Ves. jun.* 277, Lord Thurlow said, "The husband is more a formal party than any thing else; for the plaintiff really goes against the wife in respect to her separate maintenance." Thus her case is entirely reversed. She is primarily, if not solely liable; and like every other step in the defence, the answer is her independent act as a *feme sole*. It would not be denied that the joint answer of a partner would bind him, and she is more than a partner. We are to intend that she had full notice from the beginning, and that her solicitor and counsel have conducted the suit as one really against her. The answer is signed by *Jesse*

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*Ann Dyett*, though sworn to by J. Dyett, her husband only. It purports throughout to be their joint and several answer, and fully admits the agency of Livingston. By signing the answer Mrs. Dyett has adopted that admission. It was therefore evidence against her in the particular cause as it would be in any other, and that, together with the other proofs, clearly fastens the debt upon her separate estate, to the extent decreed by the chancellor. The solicitor for the complainants had a right, as in other cases, to waive her oath to the answer; and it is not to be tolerated that she should, after having led the complainants to act upon her answer at the hearing, without objection, for the first time in this court, as far as we can see, deny its legal force upon a defect of form which it was her business to avoid. Even if the objection be well founded, it should have been made below, where alone it could have been properly obviated. In *Hodgson v. Merest*, the answer being rejected, the cause stood over for proof upon terms, and the proof was finally obtained.

Livingston, being the agent of Mrs. Dyett in respect to the factory, it follows, as we have seen, that a debt contracted by her is chargeable upon the whole of the trust estate, in which this is involved as a part.

It is obvious that the credit was not given for the coal to Joshua Dyett *individually*. There is full evidence not only that it was in fact furnished for the use of the factory, but the agent of the respondents might and probably did collect, from the face of the bill, that the whole was a factory transaction. I am not aware, however, that such knowledge was necessary. I take it to be sufficient that the debt was, in truth, contracted for the benefit of the trust estate. *Upton v. Gray*, 2 Greenl. 373.

The decree of the court of chancery should therefore be affirmed.

All the members of the court, with but one exception, concurring in this opinion, the decree of the chancellor was accordingly **AFFIRMED**.



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 Barheydt v. Barheydt.
 

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BARHEYDT, *appellant*, and BARHEYDT and others, *respondents*.

A devise of the *upper half of a farm* to a son of the testator, and of the *lower part of same farm* to a son of such son, without words of *perpetuity* in the devise to either, but with a condition annexed that *the son* shall pay certain legacies to his brothers and sisters, gives a *fee* by implication, as well to the *grandson* as to the *son*.

The *introductory clause* of a will evincing the intent of the testator to dispose of all his worldly estate, has not the effect to enlarge the estate devised, unless the words of disposition in the *clause of devise* are connected in terms or sense with the introductory clause, and import more than a mere description of the property.

APPEAL from chancery. *Jacobus Barheydt* and others, heirs at law of *John I. Barheydt*, filed a bill in chancery for the *partition* of certain premises, which had been devised by the ancestor to his *grandson John*, the son of his son *John*, the appellant in this cause; the complainants below contending that the devise to the grandson gave a mere *life estate*, and that the devisee having died, the property had descended to the heirs at law of the testator. The ancestor, on the 29th March, 1808, made his last will and testament, whereby, after declaring his intent to *dispose of such worldly estate* as he had been blessed with, his just debts being first thereout paid and satisfied, proceeded as follows: "I give, demise and dispose of the same in the following manner and form. First, I give and bequeath to my oldest son *Jacobus* the brick house, &c. *Item*. I give and bequeath unto my son *Jerone* the meadow, &c.;" and then followed the clause upon which the question in this case arose, in these words: "*Item*. I give and bequeath unto my son *John* the *upper just half of my farm* lying about six miles west of the city of *Schenectady*, where my said *John* now lives. *Item*. I give and bequeath unto *John*, son of my son *John*, the *lower part of said farm* where my son *John* now lives; but my son must give out of said estate to my daughter *Mary* £100; also my daughter *Alida* £100; also to *Helena*, daughter of my daugh-

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"ter Mary, £100 ; also £200 unto my "son Henry." He then proceeded as follows : "Also, I give and bequeath unto my son Henry my pasture, which I purchased of, &c. ; also, my son Jacobus must pay unto my son Henry out of my estate bequeathed to him, £200. The whole of the above payments to be made by my son John and Jacobus, shall commence by the term of four years after my decease." John, the grandson, died in 1817, under the age of twenty-one years, unmarried and without issue, leaving his father, the appellant in this case, him surviving. The testator died in 1813, leaving four sons and two daughters him surviving. In 1826, the bill in this cause was filed. John S. Barheydt, the appellant, put in an answer, insisting that by the will an estate in fee in the premises of which partion was sought, was given to the grandson of the testator, and that, on the death of the grandson, the property descended to him as the heir at law of his son.

The cause was submitted to the CHANCELLOR on the pleadings and proofs, and the following opinion was delivered by him :

"From the language of the whole will, when taken in connection with the testimony as to the manner of occupation, I think the testator intended to give the whole of the five tracts in the devises to his son John S. and to the grandson, by the description of "my farm lying about six miles west of the city of Schenectady, where my son John now lives." John S. is therefore entitled to the whole of the upper half of the farm, as composed of the five tracts, under the direct devise thereof to him by the will ; but as the lower half of the farm was devised to the grandson without any words of limitation to create a fee, and there was no legacy or other charge upon the devisee personally, in respect of the estate or property devised to him, the law is well settled that he only took an estate for life in the lands devised, and that half of the farm on his death belonged to the general heirs of the testator by descent, as property undisposed of by the will. See *Jackson v. Bull*, 10 Johns. R. 149. *Jackson v. Embler*, 14 id. 198. The same difficulty exists as to the devises to some of the children of the testator, and perhaps to all the devi-

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sees, as the devises to Henry and Jerone are not subject to any charges whatever, and the legacies charged upon the shares of Jacobus and John S. are directed to be paid by them *out of the estate* devised to them respectively. This leaves it at least doubtful whether the devisees are either of them charged with any thing personally within the meaning of the rule. But as no such questions are raised by the pleadings, and the original devisees are still living, except Henry, it is not necessary to pass upon their respective rights in this suit. There must, therefore, be a decree for partition of the lower half of the farm devised to the grandson for life, among the heirs of the testator, or those who have succeeded to their rights respectively ;” and a decree was made accordingly. From which decree *John S. Barheydt*, the defendant below, appealed to this court, where the case was argued by

*J. Rhoades & M. T. Reynolds*, for the appellant.

*S. Stevens*, for the respondents.

*Points for the appellant :*

I. John I. Barheydt, in and by his will, devised the premises in question *in fee* to his grandson John, the son of the appellant.

Cases as to introductory clause, and the effect of the word *estate* — *Co. Litt.* 345, § 649. 2 *Preston on Estates*, 200. *Cruise's Dig. tit.* 38, ch. 9, 11. *Ibbetson v. Beckwith*, *Cas. Temp. Talb.* 157. *Frogmorton v. Holiday*, 3 *Burr.* 1618. *Hogan v. Jackson*, *Cowper*, 299. *Smith v. Coffin*, 2 *H. Black.* 444. *Waring v. Middleton*, 3 *Dessauss.* 251. *Finley v. King's Lessee*, 3 *Peters*, 379. *Morrison v. Semple*, 6 *Binney*, 94. *Earl v. Grim*, 1 *Johns. Ch. R.* 494. *Jackson v. Babcock*, 12 *Johns. R.* 389. *Jackson v. De Lancey*, 13 *id.* 538. *Jackson v. Housel*, 17 *id.* 281. *Baylis v. Gale*, 2 *Vesey*, 48. *Johnson v. Kernan*, 1 *Rolle's Abr.* 834. *Duke of Bridgwater v. Bolton*, 8 *Vesey*, 604. *Lane v. Hawkins*, 2 *Show.* 388. *Barry v. Edgworth*, 2 *P. Wms.* 523.

Cases as to the charge upon the estate devised — *Wellock v.*

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*Hammond, Cro. Eliz.* 204. *Collier case*, 3 *Coke*, pt. 6, p. 16. *Mary Portington's case*, 5 *id.* pt. 10, p. 41. *Read v. Hatton*, 2 *Mod.* 25. *Doe v. Fyldea. Cowp.* 833. *Moore v. Price*, 3 *Keb.* 49. *Reeves v. Gower*, 11 *Mod.* 208. *Ackland v. Ackland*, 2 *Vernon*, 687. *Freak v. Lea*, 2 *Show.* 38. *Doe v. Richards*, 3 *T. R.* 356. *Doe v. Holmes*, 8 *id.* 1. *Goodtitle v. Maddern*, 4 *East*, 496. *Jackson v. Merrill*, 6 *Johns. R.* 185. *Jackson v. Martin*, 18 *id.* 31. *Fox v. Phelps*, 17 *Wendell*, 393. *Spraker v. Van Alstyne*, 18 *id.* 200, *in error*. *Also* 1 *R. S.* 748, § 1, 2; 2 *id.* 57, § 5; *Revisers' Notes to* 1 *R. S.* 748, § 1, 2, 3, *at p.* 89 *of ch.* 1, *pt.* 2.

II. Upon the death of the testator's grandson John, an infant, unmarried and without issue, in 1817, four years after the will took effect by the testator's death, his real estate, including the premises in question, descended in fee to his father, the appellant. 1 *R. L. of* 1813, p. 53, § 3, *sub.* 3.

*Points on the part of the respondents :*

I. A devise without any words of limitation or inheritance, and without charging *the devisee personally* with the payment of any money in respect of the estate devised to him, passes only an estate for life to the devisee.

II. John Barheydt, the grandson of the testator, took only an estate for life under the devise in question. 1. There are no words of inheritance or limitation in the devise. 2. Nor is there any personal charge upon the devisee, (the grandson) in respect of the estate devised to him, or any charge whatever upon him.

III. There is no introductory clause in this will which can extend the legal import of the words used in the devising clause in question. 1. Where the legal *import* of the words used in the devising clause is sought to be extended by the introductory clause, it is not only necessary that the introductory clause in the will should express an intention in the testator to dispose of his whole interest in his estate, but the words of disposition in the clause of devise must be connected *both in terms and in sense* with the introductory clause, *and must import more than a mere*

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*description of the property devised.* 2 *Preston on Estates*, 87, 88, 192, 193. "*My manor, or all my manor of Dale, my farm, or all my farm that I bought of A., or on which my son John lives, or my estate in the occupation of A.*" and words of the like nature, are mere words of description of the property devised. *Id.* 120. *All my estate, or all my interest, or all my title, or property, in my farm, or manor, &c.,* are words which import more than a mere description of the thing devised; they indicate the quantity of interest which the testator intends to dispose of in the property devised. 2. In the will now under consideration, there is no connection between the introductory and the devising clause to the testator's grandson John, nor do the words used in the devising clause import any thing more than a mere description of the land devised. It is the uniform unbroken rule, that by such a devise a life estate only passes to the devisee. 2 *Preston on Estates*, 192, 193, 202, 203. *Denn v. Gaskin*, *Cowp.* 657. *Frogmorton v. Wright*, 3 *Wils.* 414. *Doe v. Allen*, 8 *T. R.* 497, 502, 503.

After advisement, the following opinion was delivered :

By Chief Justice NELSON. The point in this case turns mainly upon the devises to John the *son*, and John the *grandson*, and involves the question what quantity of interest the grandson took in the moiety of the farm devised to him—whether an *estate for life*, or an *estate in fee*? If the latter, as he died without issue, and the estate coming from his paternal ancestor, it would go to his father, the appellant, under the third canon of descents; but if he took only a life estate, it must descend to the heirs of the testator.

The general rule is undisputed, that a devise to A. without words of limitation, such as, *and to his heirs*, carries with it only an estate for the life of the devisee. It was settled in analogy to the principles that govern the limitation of estates by deed at common law, which was the elder mode of transferring titles; but with this difference, that while in respect to deeds,

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the rule was uniform, and the fee never permitted to pass without words of inheritance ; in regard to wills, they being often the production of an unskilful draftsman, upon the emergency of the occasion, it was held that an intent *might* be inferred from other provisions and expressions, supplying the want of such words.

The parts of the will that may properly be relied on to raise this intent here, are *the introductory clause*, and *the provision for the payment of the legacies*. Comparing the language of this will with the cases that we were referred to by the counsel for the respondents on the argument, in which the influence of these introductory words upon the interpretation of wills was discussed, and some general principles laid down in respect to them, I am inclined to think no controlling effect can consistently be given to them. They are often words of course, and as was truly said, are not inappropriate, even where the testator intends giving but a part of his interest. They should in some way be connected in the body of the instrument or otherwise, with the more important devising clause, in order to have the effect of enlarging the estate. I am unable to perceive such connection here, within the principle or spirit of the cases.

But the words charging the payment of legacies deserve more consideration. In respect to them, it has been long settled that a condition or direction imposed on a devisee to pay a sum of money, enlarges the devise to him, without words of limitation, into an absolute estate in fee. *Cro. Eliz.* 204. *Cro. Jac.* 599. *Willes*, 138. *Cowp.* 356. 3 *T. R.* 356. 5 *id.* 13. 5 *East*, 87. 2 *Powell*, ch. 19, *Jarman's ed.* The ground of this rule is, that unless the devisee were to take a fee, he might in the event be a loser by the devise, since he might die before he had re-imbursed himself the amount of the charge upon him ; and the rule applies to every case where a loss is possible. *Collier's case*, 6 *Rep.* 16, a. *Cro. Eliz.* 379. 2 *Mod.* 26. *Willes*, 140. Where the sum is charged *exclusively* upon the land, the rule is not generally applicable, as then the devisee cannot sustain loss ; the land only can be resorted to to raise the charge. In some cases,

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the devisee is not only made *personally* liable, but the *estate* devised is also charged for better security ; and the failure to mark this distinction has sometimes led to confusion, and apparent contradiction in the decisions. The same remark may be made also of the failure to discriminate between a charge *on the land generally*, and on the *particular estate* devised. In the former case it attaches to the *land*, and follows it into whosoever hands it may pass ; in the latter, the lien terminates with the estate devised, which may be short of a fee. Now, in this case, the charge is both upon the estate devised, and upon John the son, for the legacies are to be raised *out of it* by him. "*My son John must give out of said estate;*" and again, "*the whole of the payments to be made by my son John,*" &c. Here the *fund* is designated, as well as a *personal liability* imposed. The words are much stronger than those in *Doe ex dem. Stevens, v. Snelling*, 5 East 92, which were as follows : "after having thereout paid and discharged all my just debts and funeral expenses ;" also, "subject to the payment thereout of all the aforesaid legacies ;" and which were held clearly sufficient to pass the fee, in the absence of words of inheritance. Other cases might be cited, but the above contains a full exposition of the doctrine, and is a sufficient authority for the conclusion, that John the son took the fee of the *upper half*, by reason of being personally liable to pay the legacies.

This brings us directly to the question first stated, namely, whether the grandson also took the *fee* of the *lower half* of the farm. It must be admitted that he was not personally liable, as the payment of the whole amount is imposed on the father ; but it is imposed upon him in respect to both estates devised, the *lower* as well as the *upper* half of the farm. The property is designated by the testator as *my farm*, the one half of which he first gives to the son, and then the other to the *grandson*, and adds, "but my son John must give *out of said estate*, that is, out of the *farm* just devised, to my daughter," &c. This appears to be the plain import of the clause as derived from a careful attention to the words and their collocation. The other construction

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would be a very narrow and straitened one, that is, to limit the term *said estate*, in the connection found, to the part of the farm previously devised to the son ; it might with more propriety be confined to the other part, as that is the last antecedent. The *lower half* then, I have no doubt, is subject to a moiety of the legacies, and constitutes a fund to which the legatees might have resorted for payment ; and out of which the father might probably have reimbursed himself, had his son not died and he had advanced the whole himself.

But the charge upon the land *exclusively*, as we have seen, will not generally work an enlargement of the devise into a fee. The case is peculiar, and I think without a parallel in the books. The grandson must have been quite young at the date of the will, which was in 1808 ; he died in 1817, under age. The two moieties of the farm are devised in the same words, and legacies to the amount of \$1,200 are charged upon the whole, and also upon the person of the father in respect to the whole. I may be wrong, but I have not been able to resist the conclusion, that this peculiar arrangement, and difference in personal liability is attributable to the relation of father and son, and the tender years of the latter ; that in truth the charge was wholly thrown upon the father, not because it was intended the whole should come out of him, but because he was most fit and competent to see it paid and have the property disencumbered, and that for this purpose the father was put in the place of the son, and made personally liable both in respect to his own and his son's share ; and that no distinction existed in the mind of the testator as to the interest intended to be passed in the several parts of the farm.

There is another view of the case which goes far, in my judgment, to confirm this conclusion upon a principle laid down by the court in *Loveacre v. Blight, Cowp.* 356, where Lord Mansfield says, if a man devise lands to another, paying *thereout* £100, or any other gross sum, though he adds no words of limitation, yet the devisee shall have a fee. In short, he observes, wherever any thing is directed to be done which, strictly speak-



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ing, an estate for life only may not be sufficient to answer, the court will imply a fee. The same rule is also stated in *Doe, ex dem. Stevens v. Snelling*, before referred to, particularly by Lawrence, J. p. 96. After laying down the general rule, that if the person is charged he must take the fee, he observes, it is the same thing if such an indefinite estate be given to one, and the debts are to be paid out of the estate given to the devisee, he must also then take the fee : for otherwise the estate may not be sufficient to pay the debts. 2 *Powell*, 388, 389, 394, *Jarm. ed.* Now apply this principle to the words of the present will : The several legacies are to be paid out of the estate devised ; suppose the grandson takes but a life estate, what security is there that the fund would be sufficient to enable the father to discharge the duty imposed upon him, the payment of \$1,200 ? The charge might fall wholly upon the *upper half*, by the termination of the life of the grandson. I admit the force of this view, as well as my opinion upon the case, depends upon the construction that the legacies are charged upon both estates devised in the farm ; but I am so well satisfied of this, that I am willing to rest the whole case upon it.

My conclusion therefore is, 1. That the legacies are a personal charge upon the testator's son John, and hence he must take the fee in his share ; 2. That he is made personally liable in respect to the estate devised in the entire farm, the *lower* as well as the *upper half*, on account of the minority of his son ; and that no distinction can consistently be made in respect to the quantum of interest in the two devises ; and 3d. That each devisee must take a *fee*, in order to enable the father to discharge the duty imposed upon him by other portions of the will, namely, the payment of the legacies, as they are charged upon both interests devised.

I am therefore of opinion that the decree of the chancellor ought to be reversed.

All the members of the court, with but one exception, concurring in this opinion, the decree of the chancellor was accordingly REVERSED.

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SAMUEL ANDERSON, *appellant*, and DANIEL ANDERSON, *respondent*.

Where a party in chancery, in whose favor a decree or order has been made, *dies* after the entry of the decree or order, and *previous* to the service of notice of the same, and the opposite party is desirous to *appeal* to the court for the correction of errors, his course is to defer the prosecution of the appeal until the suit has been *revived* in chancery in favor of the proper representatives of the deceased, and due notice given him of the decree or order by the solicitor of the substituted parties. Notice given by the solicitor of the party *deceased*, may be regarded as nullity.

So where there is an abatement *after notice of appeal*, and *before* the petition of appeal is presented, *it seems*, the practice is to revive the cause in the inferior court, by bringing in the representatives of the deceased party; but where either party *dies after* the appeal is presented in the appellate court, the practice is to bring in the proper parties. It is not necessary in such case to revive the cause in the inferior court, as was done in *Wilson v. Hamilton*, 9 Johns. R. 442.

*It seems*, that if a party in whose favor the decree was made should die *after* notice of the decree given to the opposite party, and within the *fifteen days* allowed for appealing, that an appeal would be held valid if the petition of appeal and the bond required by statute in cases of appeal were *dated* as of a day anterior to the death of the deceased party.

Where an appeal was made after a suit abated, and before a revival in the court below, and a bond was executed to the representatives of the deceased party, *it was held*, that the bond was void and the appeal irregular, and the proceeding was accordingly dismissed.

THIS was a motion to *dismiss an appeal* from an interlocutory order of the court of chancery. The appellant, who was the defendant in the court below, made a motion before the chancellor on the 6th of September, 1837, which was denied by the chancellor on the 27th August, 1838. Daniel Anderson, the respondent, who was the complainant below, having died in the month of May, intermediate the hearing and the decision, the order of the chancellor denying the motion was, by his direction, entered *nunc pro tunc*, as of the time the motion was heard. On the 11th September, 1838, the solicitor for Daniel Anderson in his lifetime, served notice of the chancellor's order on the solicitor of the appellant, Samuel Anderson, who thereupon, within the *fifteen days* allowed for appealing from interlocutory

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decrees, appealed to this court, and executed a bond "unto Daniel Anderson, if living, and if not living, then to his executors, administrators or representatives and heirs, and to those who may succeed to the rights of the said Daniel Anderson in the subject matter of the suit mentioned in the recital of this bond."

*J. Rhoades*, for the motion.

*A. Taber & S. Stevens*, opposed.

After advisement the following opinion was delivered :

By Mr. Justice BRONSON. The party has fifteen days after notice of an interlocutory decree or order of the court of chancery within which to appeal to this court. 2 R. S. 605, § 79. Knowledge of the order is not enough ; there must be a formal written notice to the party or his solicitor, before the fifteen days will commence running. *Jenkins v. Wild*, 14 *Wendell*, 539. In this case the suit abated by the death of the complainant. It could not be further prosecuted, nor could any thing be done to prejudice the rights of the defendant, until the suit had been revived in favor of the proper legal representatives of the deceased. The authority of the complainant's solicitor was at an end, and the notice which he gave of the chancellor's order was a nullity. The defendant was in no danger of losing his appeal. He could only be precluded by a revival of the suit, and a notice of fifteen days from the new party complainant or his solicitor.

The attempted appeal was not only unnecessary for the saving of the defendant's right of review, but was, I think, irregular and void. In cases not otherwise provided for, this court on appeal follows the practice of the house of lords in England. *Rule 33*. When either party dies after the appeal has been presented to the lords, the practice is to revive the appeal by bringing in the heir at law or personal representative of the deceased party. It is not necessary in such cases to revive the cause in the inferior court, though that course was formerly considered

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indispensable. When there is an abatement after a notice of appeal and before the petition of appeal has been presented in the house of lords, the usual, if not the uniform, course is, to revive the cause in the inferior court, and then make the representatives parties to the appeal. *Palmer's Prac. in House of Lords*, 80, 81. *Sydney's Appeal Prac.* 110. *Rogers v. Paterson*, 4 *Paige*, 409. Where the suit abates before an appeal is commenced, I do not find that there ever has been an appeal until after a revival of the cause in the court below, by or against the proper legal representatives of the deceased party. It is possible that this court would sanction an appeal in such a case, if it were necessary to reserve the right of review; as in a case where the party in whose favor the decree was made should die after notice to the other party of the decree and within the fifteen days allowed for appealing. Under such circumstances, if the petition of appeal and the necessary bond were dated of a time anterior to the death of the party in whose favor the decree was made, the appeal might, perhaps, be held valid. But it is not necessary to decide that question on the present occasion.

The course pursued in this case is not only without the sanction of precedent, but was not essential to the rights of the appellant. And besides, there was no bond "to the adverse party," and without it, the statute declares that the appeal "shall not be effectual for any purpose." 2 *R. S.* 605, § 80. The bond executed in this case was not aided by the provision, 2 *R. S.* 556, § 33. It was, I think, defective in substance, and utterly void.

In *Wilson v. Hamilton*, 9 *Johns. R.* 442, there was an abatement after the case had been brought into this court by appeal, and the cause was remanded to the court of chancery for the purpose of bringing in the new parties. This was done on the ground, as was said, that, "this court does not possess original jurisdiction, so as to award process to bring in the parties whose interest has accrued since the appeal was filed." This case goes further than is necessary to overturn the present appeal. But I

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only refer to it because it relates to the subject, and not as an authority against the appellant, for the reason that I think the decision proceeded upon a mistake of the practice, and ought not to be followed. When a cause has been regularly brought here by appeal, and an abatement by death or otherwise afterwards happens, there can be no doubt that this court possesses the means of exercising its jurisdiction, without invoking the aid of the subordinate tribunal. The practice of the house of lords on appeals, which we profess to follow, has settled that question.

The appeal was irregular, and should be dismissed. There has been a mistake on both sides—by one party in giving notice of the order, and by the other in attempting an appeal—and no costs should be awarded.

The following order was made by the court :

*Ordered*, That the appeal be dismissed without costs, and without prejudice to the right of the defendant below to appeal from the order of the court of chancery within fifteen days after the suit shall have been revived in that court, and notice shall have been given by the new party complainant of the order appealed from.

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THE SEA INSURANCE COMPANY, *appellants*, and SAMUEL WARD  
and others, *respondents*.

A decree of the court of chancery for the appointment of a *receiver*, on the petition of the stockholders of an insurance company, is *equivalent to an order for the assignment* and delivery of the securities, evidences of debt, chattels and things in action belonging to such company.

To *stay the execution of such decree* for the purpose of prosecuting an *appeal*, the party against whom the decree is made is bound to bring the property into court, or to execute a bond to the opposite party, with two sufficient sureties, in a penalty at least double the value of the property, *conditioned to abide* the order of the court for the correction of errors; a bond conditioned only for the *prosecution of the appeal* and for the payment of *costs and damages* that may be awarded against the appellant, is not enough to stay the issuing or execution of process to enforce the decree.

When such decree has been appealed from, *it seems* that the chancellor has lost all jurisdiction over the matter, so that he cannot modify an injunction in respect to

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the property which by the same decree was ordered to be issued. Whether the court for the correction of errors will, under any circumstances, previous to the hearing of the appeal, modify or dissolve an injunction thus issued, *quere*.

On the petition of *Samuel Ward* and others, who were stockholders of the Sea Insurance Company, praying the appointment of a receiver and the issuing of an injunction pursuant to the statute relating to *proceedings against corporations in equity*, 2 R. S. 461, the court of chancery, on the 3d day of December last, made a decree directing a reference to one of the masters of the court to appoint a receiver of the property and effects of the company, and investing the receiver with all the powers conferred by the 41st section of the statute. It was further decreed that an injunction issue restraining the company and its officers from exercising any of its corporate rights, &c. except that the officers of the company, until the appointment of a receiver should be perfected, were at liberty to collect the debts of the company, and to deposit the money with the New-York Life Insurance and Trust Company, to the credit of the receiver who should thereafter be appointed, or pay out the same in discharge of the liquidated debts of the corporation.

An injunction was issued in pursuance of the decree. The company then appealed from the decree to this court, and gave the necessary bond for perfecting the appeal, in the penal sum of \$500, pursuant to 2 R. S. 605, § 80. The proceedings before the master for the appointment of a receiver were thereupon suspended, on the ground that the appeal, in the opinion of the master, was a stay of proceedings.

The appellants by their petition, now represent, that they intended to do everything necessary to make the appeal a stay of proceedings, and if they have not succeeded in doing so, they pray an order of this court staying proceedings on the decree pending the appeal; that the injunction may be dissolved or suspended, and that the directors may be permitted to go on with the affairs of the company in the usual manner. They also pray, in case any further act on their part is necessary to make

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the appeal a stay of proceedings, that the same may be permitted to be done now with the like effect as though it had been done when the appeal was originally made.

*J. V. L. Pruyn*, for the motion.

*J. Blunt*, contra.

After advisement, the following opinions were delivered :

By Chief Justice NELSON. In respect to the *modification* or even *dissolution* of the injunction by this court, after an appeal, I am not disposed to disclaim the right to exercise the power here, when a fit case is presented. The appeal brings up the *decree* below, with all the proceedings depending upon it, and I can readily participate in the doubt expressed by the learned chancellor as to *his* further jurisdiction over the subject matter. But, however that may be, clearly, in a case where a modification becomes necessary to prevent a waste or destruction of property tied up by the writ of injunction, the court could not hesitate, on an application, to interpose its authority. We should do here, what the court below would be called upon to do, in a judicious exercise of its powers, if the decree still remained before it.

But in this case, any modification *further* than what took place when the writ issued, would be, in effect, anticipating a judgment upon the merits. The decree involves the dissolution of the corporation, and it stands as the law of the case until reversed. What right, then, have the directors to insist upon the enjoyment of all their corporate privileges pending the appeal? Until they can obtain a reversal of the decree, they are deemed to have forfeited them. This we are bound to assume. They are still permitted to take care of the assets, collect and pay debts till a receiver is appointed for that purpose, which, I think, is all that can reasonably be conceded, with a due regard to the rights of the public, of creditors and stockholders.

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As to the stay which is asked of the proceedings under the decree below for the appointment of a receiver, the question depends upon a construction of the 83d section of the statute, 2 R. S. 503, which provides, that if the decree appealed from directs the assignment or delivery of any securities, evidences of debts, documents, chattels or things in action, the issuing or execution of process to enforce such decree shall not be stayed by such appeal, unless the articles required to be assigned or delivered be brought into court, or placed in the custody of such officers or receivers as the court shall appoint; or unless a bond in a penalty at least double the value of the articles, &c. be given to the adverse party, with two sufficient sureties, &c. conditioned that the appellant abide and obey the order of the court for the correction of errors, made upon the subject of such appeal. On compliance with these conditions, the 86th § directs a stay.

The receiver, when appointed, is "to take charge of the property and effects of the corporation, collect, sue for and recover the debts and demands that may be due and the property that may belong to it. § 41. He is also clothed with all the powers and authority conferred upon receivers, appointed in case of the voluntary dissolution of a corporation, who are invested with all the estate, real and personal, belonging to it. § 42, 67. Looking, then, at the powers and duties of this officer, there cannot, I think, be a doubt but that the decree appointing in this case a receiver to take charge of the effects, virtually *directs the assignment of the securities, evidences of debt, documents, choses in action, &c. of the corporation, within the meaning of § 83.* A transfer to him is the legal and necessary operation of it; he comes into actual possession of all the assets, real and personal, and holds as a trustee for the benefit of the creditors and stockholders. The object of the statute is quite obvious; it is to preserve the fund in litigation, so as to abide the final determination of the court.

It is said that the directors are responsible men, and of sufficient ability to account for the fund in any way the court may ultimately direct. But when the decree below appealed from directs the assignment or delivery of property within this sec-



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tion, the statute is imperative. We are not at liberty to regard the character or condition of the parties. The security must be given to stay the proceedings.

Whether the order of assignment or appointment of a receiver, which is the same thing, is proper or not, is a question not now before us ; that is directly involved in the appeal, and will be determined when it is heard.

I do not see, therefore, that any action is necessary upon this motion, other than to deny it. The receiver is not yet appointed, as it appears the master was of opinion that the appeal and usual bond for costs and damages operated as a stay. If so, the appellants can yet give the bond required by the 83d §, and thus effectually stay the proceedings before the master. They will then secure to themselves the possession and management of the assets, pending the appeal, as far as is consistent with the interests of the public, the creditors and stockholders of the corporation. I am of opinion that the motion should be denied with costs.

By Mr. Justice BRONSON. The appellants have only given such bonds as is necessary for the purpose of perfecting an appeal. 2 R. S. 605, § 80. The decree does not, in terms, direct the assignment or delivery of the assets of the corporation, but such, I think, is its legal effect. When a receiver shall be appointed in pursuance of the decree, it will be the duty of the officers of the company, and all other persons having in possession any property of the corporation, to deliver the same to the receiver ; and it will be his duty to take the property into his possession, and he will have ample authority to sue for and recover the same. 2 R. S. 464, § 41, 42. A decree directing the appointment of a receiver, with such powers, was in effect a decree for the delivery of the assets of the corporation. The case falls within the 83d section of the statute regulating appeals, and as the requisition of that section has not been complied with, the execution of the decree has not been stayed pending the appeal.

The legislature has declared the terms on which an appeal may be made to operate as a stay of proceedings, and if this court

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has any power over the subject, it cannot, I think, be expedient to interfere, except under very special circumstances. In this case, if the appellants are prepared to give the security which the statute requires, they do not need our aid ; no receiver has yet been appointed, and the security required by the 83d section may now be given with the same effect as though it had been given at the time the appeal was perfected.

Until a receiver shall be appointed, the injunction which has been issued does not restrain the officers of the company from collecting the debts of the corporation ; and they are also at liberty to pay the liquidated debts against the company, or to deposit the money which may be collected with the trust company. They can need no further power for the purpose of preserving the assets of the corporation pending the appeal. We cannot dissolve the injunction, or make an order allowing the directors to go on with the affairs of the company in the usual manner as the petitioners desire, without examining the case upon the merits ; and that can only be done when the appeal shall be regularly brought to a hearing. I see nothing in the case which will authorize this court to interfere, and am of opinion that the prayer of the petition should be denied.

END OF CASES IN ERROR.



CASES OF PRACTICE  
AND  
DECISIONS IN NON-ENUMERATED CASES  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF NEW-YORK,  
SINCE JUNE, 1839.

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THE PEOPLE, *ex relatione* Elam Lyndes and Francis E. Spinner,  
*vs.* THE COMPTROLLER OF THE STATE.

*Commissioners* for the erection of a public work, authorized by a special act of the legislature to be appointed by the governor, secretary of state, and comptroller, the duration of whose office is not prescribed by law, hold their offices *during the pleasure* of the authority making the appointment; and, of course, are subject to removal from office by the same authority.

MANDAMUS. This was a motion for a *mandamus* directing the comptroller to issue his warrant, authorizing the treasurer to pay to the relators certain moneys drawn for by them, under the following state of facts : In 1836, an act was passed by the legislature of this state authorizing the establishment of a state lunatic asylum, *Statutes, sess. of 1836, p. 110.* By the fourth section of the act, it is made the duty of the *governor, secretary of state, and comptroller*, after a site shall be obtained for the location of the asylum, to appoint three commissioners to contract for the erection of the asylum, and to superintend the building thereof. To those commissioners the *treasurer* of the state is directed to pay, on the warrant of the comptroller, such sums as

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shall be required for the building of the asylum, not exceeding a certain amount ; and a *per diem* allowance is made for the services and expenses of the commissioners *while actually employed* in the duties of their office. On the 7th day of July, 1837, the relators were duly appointed commissioners to contract for the erection of the asylum, and to superintend the building thereof, and took upon themselves the discharge of the duties of their appointment. On the first day of May, 1839, a further act was passed in reference to the asylum, *Statutes, sess. of 1839, p. 286*, directing the payment of further sums of money to the commissioners appointed to contract for and superintend the building of the asylum. On the twenty-second day of May, 1839, the *relators were removed from office* by the governor, secretary of state, and comptroller. On the same day, the relators made a draft upon the *treasurer* of the state for the sum of \$5,000 for the purposes of the building, and caused the same to be presented to the *comptroller* for his warrant, which being refused, the present motion was made for a mandamus.

*W. Hunt*, in behalf of the relators, insisted that the relators were still commissioners, notwithstanding the act of the governor, secretary of state, and comptroller, under which it was claimed that their powers as commissioners had ceased. He contended, that their powers could be put an end to only by the *legislature*. That they were not *officers* within the meaning of the 16th § of the 4th art. of the constitution, which provides, that where the duration of any office is not prescribed by the constitution, it may be declared by law ; and if not so declared, such office shall be held during the pleasure of the *authority* making the appointment. This provision relates to *officers*, whereas the relators hold only an *employment* as contradistinguished from an *office*, which has been defined to be an employment on behalf of the government, in any station or public trust not merely *transient occasional* or *incidental*. 20 *Johns R.* 493. Directors of the Bank of England, though appointed by the crown, are not deemed public officers. 2 *Atk.* 405. If, however, the relators should

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be deemed to hold an *office*, they can be *removed from office* only by the legislature. The officers of the government designated by the act of 1836 to make the appointment, are not *an authority* within the meaning of the constitution, during whose pleasure the office is to continue. They do not constitute a body or board, having power as such to make appointments. In this particular instance, it was a special delegated authority, and having exercised it, the power is spent. Nothing can be claimed for them by implication, and consequently the power of removal not being conferred, it did not exist. The counsel also submitted, that if the relators were to be deemed as holding an *office*, that the term or duration of their office was prescribed by the law under which they had received their appointment. They were appointed to contract for the erection of the asylum, and to superintend the building thereof. Having planned the building, contracted for its construction, and being intimately acquainted with the details in reference thereto, there is a fitness and propriety in their continuance in the employment until the completion of the undertaking; and such should be presumed to have been the intention of the legislature in authorizing their appointment.

*J. C. Spencer*, (in place of the attorney general, who was indisposed,) opposed the motion.

*By the Court*, NELSON, Ch. J. If the commissioners are to be regarded as holding an *office* within the constitutional meaning of the term, there can be no reasonable doubt of the existence of the competent power to remove them. The 16th § of the 4th article of the constitution provides, that "where the *duration* of any *office* is not prescribed by the constitution, it may be declared by law; and *if not so declared, such office shall be held during the pleasure of the authority making the appointment.*" The duration of office here obviously refers to the *period of time* the incumbent shall hold, that being the proper measure of it. This period had been previously prescribed in the constitution in

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respect to many of the offices ; and the scope of the section is to provide for the case of officers whose term of office is left at large, as well those that might be created by statute, as those to be found in the constitution. That the provision applies to the former, is apparent from the 15th § of the same article of the constitution, which provides for the election or appointment of all officers thereafter to be created by law, who it is but reasonable to conclude were, among others, intended to be referred to, and regulated by the succeeding section, as they come fairly both within its reason and general terms.

Assuming, then, that the commissioners are to be regarded as holding an *office*, which I am inclined to think they should be, within the intent of the legislature, being recognized as such twice in the statute, § 5 and 9, it is clear, according to the above exposition, as there is no fixed period of time during which they are to hold, they are removable at the pleasure of the appointing power ; and as that power is vested in the governor, secretary of state, and comptroller, for the time being, they are removable by them.

But even if we were to reject the idea that the commissioners hold an *office*, the result must necessarily be the same. In such case, they are individual *agents* employed on behalf of the government, whose rights, like other ordinary employees, must depend upon the *contract*, express or implied, under which the service is performed. If no time is fixed therein, either of the contracting parties may terminate it at will ; the commissioners cannot claim to extend the time beyond the agreement of their employers. This is too obvious to require argument. It is conceded that no time is prescribed in the terms of appointment, or in the provisions of the statute under which it was made ; but it has been argued that both indicate an engagement for the superintendence of the entire job—the event of finishing the work is said to be the limit of the contract, subject to the control of the legislature. I cannot think so. The statute prescribes the duties of the commissioners *while acting as such* ; they are to devise a plan of the building, subject to the approval of the governor ;

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contract for and superintend the erection of the same ; draw the necessary funds from the comptroller, pay the workmen, &c.; for all which they receive three dollars per day for the time actually engaged. The *tenure* by which they were to perform the service was not in the minds of the legislature, nor is there any thing in the act bearing at all on the subject, further than simply to provide for their employment. It must depend, therefore, as before said, in the aspect we are now viewing the case upon the *contract*, and in *that* we perceive nothing binding upon either party to continue the service beyond the consent of each. Certainly, the commissioners were under no obligation to go on with the work, and might have surrendered the trust at any moment, in despite of their employers, having engaged for no definite time, or even until the work should be finished ; and the contract must be regarded as mutual. Besides, putting the case upon *contract*, and not on the footing of *office*, even were we to consider it for any reason as extending to the completion of the work, it is not perceived how a specific performance could be enforced ; if broken, the remedy, as in most cases of a breach of personal contract, must be sought for in damages. There are but few exceptions, and those the subject of chancery jurisdiction.

It is urged that the power of the governor, &c. is exhausted in the appointment already made. This I cannot admit. The object and purpose for which it was conferred require its continuance, otherwise the whole enterprise may fail in case of vacancy by death, resignation, &c. Indeed, not only the continued existence of the power, but the right to exercise it by removal and new appointment, at the pleasure of the donees, seem indispensable, as well to insure the execution of the work, as the service of competent and faithful agents for the purpose. If the governor, &c. cannot fill *vacancies*, or displace incompetent *agents*, if such should happen to be appointed, no other body can, short of the legislature. The necessity of the power is apparent, and it seems to me that it clearly exists.

Believing, therefore, that the relators have been lawfully



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removed, it follows that we cannot compel the comptroller to place the funds claimed in their hands.

The above conclusion makes it unimportant to notice other questions raised on the argument.

Motion denied.

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FAIRBANKS vs. CAMP and others.

In an action on a bond, other than for the payment of money, where the plaintiff assigns several breaches, the defendant is not entitled to costs, although the plaintiff fail in establishing several of the breaches assigned by him, if the plaintiff succeed upon any one breach; the defendant is not entitled to costs unless the plaintiff fail upon all the breaches.

QUESTION of costs. This was an action of debt, on a bond given by a deputy sheriff and his sureties, conditioned for the faithful discharge of the duties of the office of deputy. The plaintiff assigned six breaches: four of which related to one default of the deputy, and two to another. The cause of action in the four breaches was the same; the breaches differing only in form. So of the two breaches. The plaintiff recovered a verdict. On the cause of action set forth in the four breaches, the jury assessed the plaintiff's damages at \$437.43, and on the cause of action set forth in the two breaches, they assessed his damages at \$104.81. On a motion for a new trial, the court held that the plaintiff was not entitled to recover upon the four breaches, and ordered a new trial. An arrangement was thereupon entered into by the parties, in pursuance of which the plaintiff entered a *nolle prosequi* as to the four breaches, and the defendants gave a cognovit for the damages assessed on the two breaches, without prejudice, however, to their right to apply to the court for costs on the breaches which the plaintiff had failed to sustain.

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*S. Stevens*, for the motion.

*D. Burwell*, contra.

*By the Court*, NELSON, Ch. J. The question is, are the defendants entitled to costs? If they are, it must be under the 26th § of 2 R. S. 617, *subd.* 2: "Where there are two or more *distinct causes of action* in *separate counts*, the plaintiff shall recover costs on those issues which are found for him; and the defendant on those which are found in his favor." This section was intended as a substitute for § 10. 1 R. L. 519. The case before us does not fall within the *terms* of the act, and I am inclined to think is not within its intent.

The legislature seem to have had in their minds *two distinct causes of action*, not necessarily connected in the suit, but which were consistently joined and set forth in several counts of the declaration. In such a case, where the plaintiff fails in one of them, it is perfectly just that he should pay costs. The rule is probably new, though there is some confusion in the English cases. See *Wright v. Williams*, 2 *Wendell*, 632, and *cases there cited*. Here the suit is upon but one instrument, and the plaintiff is bound to set out all the breaches in respect to which he claims damages. Strictly speaking, there is but one count, and one cause of action, as the bond is the foundation of the action, which is entirely grounded upon it. 2 *Saund.* 187, n. 2.

Again: At common law in an action of debt upon bond, the plaintiff could assign but one breach, as that forfeited the penalty which was recovered. The act of 8 and 9 *Wm.* 3, of which ours is a copy, 2 R. S. 378, allowed him to assign any number of breaches, and gave him judgment for the penalty as before, and for costs, if he established any one of them. 1 *Saund.* 58 n. 1. 2 *id.* 187, n. 2. Our statute, also, is very explicit on this point. 2 R. S. 378, § 6 to 10 *inclusive*.

I am of opinion, therefore, that the defendants are not entitled to costs, and consequently the plaintiff recovers costs. As, however, the question is new on the statute, no costs are allowed to either party on this motion.

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The People v. Baker.

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THE PEOPLE *ex relatione* B. L. Woolley, *vs.* C. BAKER, sheriff  
of Jefferson county.

In the *redemption of lands* sold under execution, a *second* or *subsequent creditor* who redeems after a redemption already made, must present the evidences of his right to redeem and make payment of the moneys necessary to be paid to the *last redeeming creditor*, or to the *officer* who made the sale ; payment to the *original purchaser* in such case is not sufficient.

Payment to a deputy sheriff who made the sale is good, although the *term of office* of his *principal* has expired.

Payment in a check on a bank is not good ; money or its equivalent must be paid.

MANDAMUS. This was an application for a mandamus, commanding the sheriff of Jefferson to execute a deed of certain premises, sold by virtue of an execution against the *Brownville Cotton Factory*, struck off at public vendue to W. Averill, and claimed to have been redeemed by the relator. On the 23d December, 1837, the premises in question were sold by a deputy of the sheriff of Jefferson county by virtue of an execution against the Brownville Cotton Factory, issued on a judgment for \$2,785.20, docketed on the 21st August, 1837, at 10 o'clock, A. M., and struck off to William Averill, for the sum of \$500. Previous to the expiration of the fifteen months, the time allowed by law for redemption, to wit, on the 11th March, 1839, the relator produced to the deputy sheriff who had sold the premises, the proper vouchers showing that he was the assignee of a judgment against the same defendants, for the sum of \$2,805.32, docketed two hours subsequent to the docket of the judgment under which the premises were sold, and paid to the deputy sheriff the sum bid by Averill, together with the interest thereof. This payment was made in a check on a bank, which was received by the deputy as cash. On the 15th March, 1839, one C. Graves presented to Averill, the purchaser at the sale, the proper evidence showing that he was the assignee of a judgment against the same defendants, senior to both the other judgments, to wit, of a judgment

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docketed on the 7th August, 1837, and paid to Averill the \$500 bid by him at the sale, together with the interest thereof, and claimed the right to redeem the premises. On the 24th March, the evidence of Graves' right to redeem, were delivered to the deputy sheriff, who was informed of the acts done by Graves. On the next day Averill offered to pay to the *relator* the money received by him from Graves, which the relator refused to accept. The office of the sheriff of Jefferson *expired* by its own limitation on the 1st January, 1838, and it was insisted in opposition to the motion, that the *deputy's office* expired with that of his principal, and that consequently the payment to the deputy on the 11th March, 1839, was a nullity. It further appeared by a *certificate* of the deputy sheriff that the sale was had by virtue of an execution issued on the judgment under which the relator claimed to redeem, but after the notice for this motion was given, the deputy made an *affidavit* stating that he had made a *mistake* in his certificate, in so certifying, as the sale was under an execution issued on a judgment *second* in point of time, and not on the *youngest* judgment.

*By the Court, NELSON, Ch. J.* A judgment creditor, by paying the purchase money and interest within fifteen months after the sale, *acquires all the right and title* of the original purchaser, 2 R. S. 371, 372, § 51, 53, 54, and when he has thus acquired the title, *any other creditor* who might have acquired it may become a *purchaser* from the first creditor by reimbursing him the sum he may have paid to acquire such title, and interest, together with his judgment, if a prior lien. § 55. And so by § 56, *any third or other creditor*, may become a *purchaser* from any second, third or other redeeming creditor. The 59th § provides, that the sums required to be paid to acquire the title of the original purchaser or to become a purchaser from any creditor, may be paid to such *purchaser* or *creditor*, or to the officer who made the sale. One question involved in this case is, whether on redemption by the second, third or other judgment creditor, after redemption by the first creditor, the money may be paid to

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the *purchaser*, or whether it must be paid to the *last redeeming creditor* or to the officer ?

The 59th §, I think, is to be taken distributively ; payment should be made to the person standing *as purchaser* at the time, or to the officer who made the sale. The redemption is from him first, and then from the redeeming creditor who has acquired his rights. After the money is paid, the *purchaser* no longer stands in that relation. By the terms of the act, the redeeming creditor " shall thereby acquire all the rights of the original purchaser."

§ 51. And the next creditor becomes a *purchaser* from him by reimbursing the money paid, and paying his lien as the case may be. § 53. After this, the first creditor is no longer the *purchaser*, nor has he any interest in the proceeding ; he as well as the original purchaser have their money, all that belongs to them under the act, and the creditor advancing it stands in their places. He is both purchaser and creditor, as it respects the making of subsequent redemptions. The 59th § must be construed in connection with the rights and relative positions of the *purchaser* and *creditor*, according to the previous section, and then there can be no great difficulty in comprehending its meaning ; it will be apparent that the terms must be taken distributively, and applied agreeably to their relative situations. Any other view would lead to great inconvenience ; parties would be multiplied indefinitely from whom redemption could be made ; and the money, whatever might be the amount, could be placed in the hands of persons who had no interest whatever in the fund, or the proceeding.

Payment may be made in every case, to the *officer* who made the sale, for the benefit of the purchaser or creditor entitled to the same. § 59. It may, therefore, be paid to the sheriff, or the deputy who sold the premises ; both made the sale : one in fact, and the other in judgment of law.

In this case, the term of office of the sheriff *expired* before the time for redemption had ended, and it is supposed that the powers of the deputy to act had ceased. This is a mistake, as will be seen by reference to the following cases : 3 *Cowen*, 89 ; 9

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Peck v. Acker.

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*Id.* 233 ; 6 *Wendell*, 224, *S. C. in error*. The several sections of the act relied upon by the counsel against the motion, § 65, 67 *inclusive*, merely provide for the cases of *death* or *removal* of the sheriff, and do not apply where the term has expired by *lapse of time*.

The payment made to the sheriff by the relator by means of a *check* upon a bank, it not being shown that the money was received on the same, is ineffectual. A check, until paid, is no payment. 4 *Johns. R.* 304. 4 *Cowen*, 553. Money, or what is equivalent, must be paid. 9 *Johns. R.* 263. The note of the agent might as well have been received. If, however, the money was received on the check before the expiration of the time for redemption, as was probably the fact, it would be sufficient.

It appears from the certificate of the deputy that the sale was made upon the youngest of the three judgments against the Brownville Cotton Factory, and upon which the relator seeks to redeem. If this be so, there is of course no question in the case, as the 58 § denies the right of the party under whose execution real estate is sold to acquire the title of the original purchaser ; but his affidavit is produced since the notice of the motion, (which for that reason cannot be read,) alleging a mistake in the certificate, and that the sale was made under the *second* judgment.

On the ground then of the defective payment, and that it appears upon the papers regularly before us that the sale was under the youngest judgment, and by virtue of it the relator seeks to redeem, the motion must be denied with costs ; but the relator has leave to renew his motion.

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PECK vs. ACKER.

A sheriff, sued for an act done by him in the execution of process is entitled to take upon himself the conduct of the defence and to retain such attorney as he sees fit, notwithstanding that he was indemnified by the party suing out the process.

IN this case, which is an action of *replevin* against the defendant as sheriff of the city and county of New-York, for taking

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certain property on an execution issued in favor of *Gardner Gallup*, an application was made in behalf of the plaintiff in the execution, that he be permitted to defend the action by a certain law firm in the city of New-York as his attorneys, and that they be *substituted* as such attorneys for *N. B. Blunt*, Esq. who had been employed by the sheriff to conduct the defence of the suit, and had given notice of retainer to the plaintiff's attorney; who, in consequence of having received such notice previous to the notice of retainer being served by Mr. Gallup's attorneys, refused to receive notice from them. Mr. Gallup has fully indemnified the sheriff against all damages to which he may be put in consequence of the levy.

*By the Court*, NELSON, C. J. We are inclined to think the sheriff should be allowed to retain the attorney. Notwithstanding the indemnity, he is still interested in the management of the defence, both as to the amount in controversy and the time when it shall terminate. A protracted litigation may increase the contingencies as to the ultimate sufficiency of the security, and an omission properly to defend may swell the recovery far beyond the amount contemplated when the surety was taken. As a general rule the party to the record, and immediately liable for the result of the litigation, should control the attorney; to create an exception, the circumstances should be very strong. If the sheriff should conduct the defence improperly and by reason thereof a recovery be had against him, the indemnitor can avail himself of such improper conduct in the action against him. Upon the whole, the sheriff should always be permitted in cases like this to take upon himself the conduct of the defence, and to retain such person as attorney as he sees fit.

Motion denied.

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The People v. Superior Court of New-York.

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THE PEOPLE, *ex relatione* Boyden and others, *vs.* THE SUPERIOR COURT OF THE CITY OF NEW-YORK.

After exception to special bail, the plaintiff may *wave* such exception without requiring a justification, provided the waiver be before the expiration of the time for justification.

**SPECIAL BAIL.** The superior court of the city of New-York ordered an *exoneretur* to be endorsed on a bail piece under these circumstances : On the 15th January a declaration was served *de bene esse*, in a suit commenced by the relators by *capias*. On the 25th January special bail was put in, and notice thereof given to the plaintiffs' attorney, who on the next day excepted to the bail, and gave notice of exception. On receiving notice of exception, the attorney for the defendant applied to the plaintiffs' attorney to withdraw the exception, who agreed to do so if his clients would consent, and shortly thereafter (*previous to the expiration of the time for justification*) served a *notice, in writing* upon the defendant's attorney *waiving* the exception, and informing him that a plea would be received. The defendant not putting in a plea, his default was entered, and judgment perfected. Subsequently the exception on the bail piece was erased, and a suit commenced on the recognizance of bail. The superior court set aside the proceedings against the bail, and directed an *exoneretur* to be endorsed on the bail piece.

*T. Sedgwick, jun.* moved for a *mandamus* requiring a vacatur of the order directing the endorsement of the *exoneretur*, and in support of his motion cited 1 *Taunton*, 426. He admitted that there were several cases in our books where the practice seemed to have been held in conformity to that of the superior court, but insisted that the decision in *Taunton* ought to be followed. The exception to the sufficiency of bail is allowed for the security of the plaintiff in the action ; its effect is destroyed by a justification ; and if the plaintiff in an action after excep-



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tion become satisfied with the sufficiency of the bail, he could not perceive any reason why he should not be permitted to say so without requiring a justification.

*M. T. Reynolds, contra.*

*By the Court, NELSON, Ch. J.* In *Flack v. Eager*, 4 Johns. R. 185, the proceedings against the bail were set aside, and an exoneretur ordered; but there the exception had never been waived, or erased. In *The People v. Judges of Onondaga*, 1 Cowen, 54, after the exception, the plaintiffs being indemnified against the insufficiency of the bail, served notice of waiver, received a plea, and proceeded to judgment. The common pleas refused to order an exoneretur, and this court compelled them to make such order. It does not appear whether the notice of waiver was *after* the time for justification or not. The opinion, however, seems to be placed upon that ground. The court say, if special bail do not justify within the time allowed by the rules, they cease to be bail. The plaintiffs cannot *then* hold them by waiving the exception. In *Thorp v. Faulkner*, 2 Cowen, 514, after the exception, the attorneys for both parties agreed by *parol* to waive it, and to proceed in the case. The court ordered an exoneretur, putting the decision principally upon *The People v. The Judges of Onondaga*. It does not appear here, whether the waiver was *after* the time for justification or not. I infer, however, that it was.

It is well settled that the bail cease and are to be deemed out of court, if they do not justify within the time allowed; and *after* this, it may well be that the plaintiff cannot waive the exception, and that even the attorneys cannot do so without the assent of the bail, 9 Wendell, 478; their contract is at an end. But if the *waiver* takes place *before* the time for justification has expired, I am unable to discover any reason against giving it effect, either in respect to the bail themselves or their principals; nor can I find any case deciding the contrary. Indeed, it is settled, that serving a declaration in chief after exception,

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operates *per se* as a waiver of it ; if this act of the party indirectly operates as a waiver, why should not effect be given to an express waiver ? Notice of exception must be in *writing*, and it may well be that a *parol waiver* would be insufficient.

Understanding the cases as above explained, as at present advised, I think the alternative writ should issue.

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ST. JOHN & WITHERELL vs. S. & L. W. HOLMES.

Where one of the *partners* of a firm executed a *warrant of attorney* under seal, for himself and as attorney for his partner, authorizing the confession of a judgment, which was accordingly entered against both defendants, the court refused to set aside the judgment on the application of the defendant who had executed the warrant of attorney. The affidavit on which the motion was founded being made by him, he was deemed the sole mover in the matter, although the notice of the motion purported to have been given for *both* the defendants.

CONFESSION of judgment by one of several partners. The plaintiffs filed a declaration and entered a rule to plead, but before service of copies of the declaration upon the defendants, received a *warrant of attorney* under seal, executed by *S. Holmes* for himself and as attorney for his copartner, authorizing the confession of a judgment in favor of the plaintiffs ; and by virtue of which a judgment was accordingly entered against *both* defendants. A motion is now made to set aside the judgment and subsequent proceedings, on the ground that the warrant of attorney was executed by one partner without authority from the other. The notice of the motion purports to be given for *both* the defendants, but the affidavit upon which it is founded is the affidavit of *S. Holmes* alone.

*By the Court*, NELSON, Ch. J. In *Green & Mosher v. W. & T. Beals*, 2 *Caines*, 254, the judgment was entered up on a bond and warrant of attorney, signed, as in this case, by only one of the partners, without authority from the other. It was held good against the partner giving the warrant, but inoperative as to the other if he chose to avail himself of the defect ; that the

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court would not interfere except on his application, as he might acquiesce in what his partner had done; and that even if he did apply, the court would not set aside the judgment, but simply direct the execution *not* to be served on his person or property. *See also* 1 *Wendell*, 336. The case of *Crane v. French*, 1 *Wendell*, 311, in connexion with the 3d section of the act of 1833, *Statutes, sess. of 1833, p. 395*, shews that the judgment in this case is irregular, for the reason that the partner was not in court when the confession was given. This seems to be essential, whether the suit be commenced by writ or declaration, in order to have it operate under the *joint debtor* act. *See also* 10 *Wendell*, 630. But still, under the practice before alluded to, the partner aggrieved must move. Has he done so in this case? The attorneys appear for *both* defendants in the motion, but it is founded upon the affidavit of the one who gave the warrant; he is setting up his own fraud by way of defeating the judgment. Should not the co-partner deny the authority and shew his dissent? His silence in *Green & Mosher v. W. & T. Beals*, was deemed an acquiescence in the use of his name. 1 *Wendell*, 336. In the absence of any proof of his dissent of the use of his name, it seems to me, according to the practice as settled, we are bound to hold the proceedings regular.

The distinction between this application to the equitable interference of the court, and the case of an action upon the instrument on plea of *non est factum*, where the issue would stand upon strict principles and the verdict must be for the defendants, is noticed in the cases above referred to.

Motion denied with costs.

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Bosworth v. Perhamus.

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## BOSWORTH vs. PERHAMUS.

Where the defence to an action is *usury*, and the plea hath been duly verified so as to entitle the defendant to the right to examine the plaintiff as a witness, the defendant *it seems* may claim the *personal attendance* of the plaintiff when the latter is a *non-resident* of the state, and is not bound to accept a *commission* to take his testimony; the court in bank will not however make any order in the matter, the proper course being to apply to the circuit judge to put off the trial in case the plaintiff does not attend after receiving notice to that effect.

PRACTICE under usury laws. On an affidavit setting forth that the defence in this case is *usury*, that the plea is duly verified, that the defendant can not safely proceed to trial without the testimony of the plaintiff who resides in the state of Vermont, and that the cause is noticed for trial at the Monroe circuit, a motion is made to stay proceedings unless the plaintiff shall attend the trial, so that he may be examined as a witness, in pursuance of the provisions of the act to prevent usury, *Statutes, Sess. of 1837, p. 487, § 2.*

*P. Cagger*, for the motion.

*A. Taber*, contra.

*By the Court*, COWEN, J. The second section of the statute provides that, in the case made by the defendant's affidavit, the plaintiff may be called and examined as a witness in the same manner as other witnesses may be called and examined. No doubt this court has power to grant the motion; but the putting off trials for the reason that material witnesses are absent, is an office which can be more discreetly exercised by the circuit judge. *Non constat* that the plaintiff will not attend upon due notice that his presence is required. Where the plaintiff is the real party in interest, and a sworn defence is interposed according to the statute, it is no doubt reasonable to require his personal attendance on the usual affidavit of materiality, even though he be

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a non-resident of the state, provided the defendant shall desire it. The circuit judge, however, has the power to postpone the trial, the same as in other cases, and should be appealed to. The motion is denied; but without costs.

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THE PEOPLE *ex. rel.* Oakley, *vs.* ACKER, Sheriff of the City and County of New-York.

An order to prosecute a sheriff's bond, given by him to be released from arrest on attachment, will not be granted until after a default upon a second call of the sheriff at a general term.

The sheriff may be called on the two non-enumerated days next succeeding or including the return day. If the attachment be returnable after the non-enumerated days have passed, he may be called on the day of the return of the process, and a second time on the first non-enumerated day in the next term; but it is irregular after a call of a sheriff in one term, to permit a term to intervene before making a second call without *previous notice* to the sheriff.

THE defendant was attached for not putting in special bail in replevin, for one Hopkins at the suit of the relator. The attachment was returnable on the first Monday of January last, but was not served in its life. After it expired, the coroner who held it sent it to the sheriff (the defendant) who admitted the service, and caused the writ to be filed, with a return endorsed, on the 28th of January, *nunc pro tunc*. Before this, however, to wit, on the 18th of January, the *second Friday of the January term*, the relator's attorney caused the sheriff to be called, and his default for not appearing to be entered. He afterwards proceeded against the coroner for not returning the attachment against the sheriff in season, and the coroner was ordered to pay the costs of the proceeding, and that the attachment against him should be thereupon discharged. The court intimated in their opinion, that the sheriff was still liable to be proceeded against, on the attachment against him; and assigned that as one reason, why they did not impose a heavier penalty on the coroner. On the 12th of July, the *second Friday of the July term*, the rela-

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tor's attorney, without any previous notice to the sheriff, caused him to be called again, and had his default for not appearing entered ; and moved and took a rule to prosecute the bond which he had executed to the coroner for his appearance on the original attachment. Of this proceeding, he afterwards gave notice to the sheriff. A motion is now made to set aside the last rule for irregularity.

*N. B. Blunt & M. T. Reynolds*, for the motion.

*J. H. Stuart*, contra.

*By the Court*, COWEN J. I am inclined to think that the call of the sheriff on the 18th of January might have been considered regular, had the relator so chosen to regard it, after he found that the sheriff had himself consented to the return and filing of the attachment as of a previous day. The relator did not, however, treat the return as regularly made at the day ; but disaffirmed it, and proceeded against the coroner for not making it in season. It is not necessary to deny that, after the latter proceeding had been disposed of, he might still have recurred to the original call, and made it the foundation of that in July term, had he given *previous notice* of such intention to the sheriff. But, as the matter stood, the whole was a complete surprise on the sheriff, to say the least. It was out of the ordinary course of practice, which is to call the sheriff twice in full term on the two non-enumerated days next succeeding, or including the return day. Where the attachment is returnable after all the non-enumerated days are past, the first call may be made on the return day. So much the sheriff must hold himself ready to meet, and, if in default on the second call, his bond may be prosecuted on the usual order for that purpose, or a further attachment may issue, or both may follow, according to circumstances. If the relator will go on without giving any notice beside that derivable from the attachment, he must strictly follow up his days in the order mentioned. If he omit to do so, the utmost we can allow is, that he shall not lose his suit, but may still go on with

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Ex Parte Van Riper.

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his calls upon due notice for such time as he would be bound to give of any other motion. That enables the sheriff to appear and answer interrogatories, or submit to terms. Such is the course which should have been pursued in this instance.

The proceedings of the relator are, therefore, irregular, and must be set aside with costs.

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Ex parte VAN RIPER, a non-resident debtor.

In a proceeding by attachment against a non-resident debtor, who is sought to be charged as a director of a foreign bank, the president and directors of which are by its charter declared to be *individually liable* for all notes, &c. issued by the bank, it is not necessary for the purpose of showing *personal liability*, that the charter should be produced as part of the *preliminary proofs*, on the application for process.

On a motion to set aside the attachment, the court will enquire into the *personal liability* of the person sought to be charged; and will hold him personally liable if the charter of the bank declares that he shall be so held.

It is no objection to the *remedy* by attachment, that the act of incorporation gives an *action* in the ordinary mode, in which the plaintiff may declare, &c. A party to whom an *action* is thus given, is not confined thereto, but may resort to any form of remedy known to the law, and he may do so in *any place* where the debtor or his property can be found.

MOTION to set aside an attachment. On the 31st May, 1839, an attachment was issued by the circuit judge of the first circuit against the real and personal property of Cornelius G. Van Riper, as a non-resident debtor, under 1 R. S. 764, 2d ed. § 1, sub. 2, *et seq.* The non-residence of Van Riper was duly shown by the affidavits of two witnesses. The petition for the attachment was presented by T. S. Underhill and J. T. Smith, who stated that they, as partners in trade, had a demand for \$3,676, over and above all discounts, arising on a certain check or draft of the Manufacturers' Bank of Belleville upon the Merchants' Bank in the city of New-York, dated 5th April, 1839, for the sum stated, of which check they the applicants were holders and owners, and which had been duly protested for non-payment: that Van Riper was, by the act of incorporation of the Manufac-

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turers' Bank of Belleville, made *personally liable* as a director thereof at the time of the making of the check. They also stated that they had another demand arising upon certain promissory notes of the same bank, payable to bearer, of which they the applicants were also the holders and owners. The applicant Underhill made affidavit that the facts set forth in the petition were true; that Van Riper was justly indebted to his firm in the amount and manner stated, over and above all discounts arising upon the check, &c. "upon which the said C. G. Van Riper is, by the charter of the said bank, personally responsible as a director thereof."

A motion was made to set aside the attachment, mainly on the ground that an attachment will not lie against a corporate director of the Belleville Bank, inasmuch as the remedy given by the charter is *local* to New-Jersey; or at any rate, being prescribed by the charter, creditors are bound to follow it strictly. It was also insisted that the papers on which the attachment issued were insufficient, inasmuch as the charter of the bank was not produced to the circuit judge, nor was it properly in evidence before him. That the provision in the charter imposing personal liability was stated in a general way by affidavit; whereas, it should have been shown particularly.

A copy of the charter was produced on the motion by the counsel for Van Riper, who was named in it as one of thirteen directors. It was passed in February, 1834, and is an act of incorporation conferring the power of conducting the business of the bank on the board of directors. The 14th section provides that the president and directors shall jointly and severally be and continue liable, individually, to every creditor, for the payment of any bills obligatory or of credit, note or notes, that they or any of them may issue or circulate, and upon demand being made at the bank during the usual hours of business, and refusal thereof, an action may be brought against the persons then acting as president and directors, jointly or severally; and that it shall be lawful for the plaintiff or plaintiffs to declare generally for money had and received, with a specification of dates, sums,



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payees, and numbers of the bills or notes, &c., and that upon judgment, &c. execution shall issue.

*W. Rutherford*, for the motion.

*R. Lockwood*, contra.

*By the Court*, COWEN, J. Was the proof of the debt sufficient in the first instance? I think it was. The statute declares, § 3, that the application may be made by any creditor, &c. having a demand against the debtor *personally*, arising upon contract, &c. amounting to \$100 or upwards, &c. By § 4, the application is to be in writing, and verified by the affidavit of the creditor, &c. in which shall be specified the sum, &c. over and above all discounts, &c. and the grounds, &c. The objection for insufficiency is founded mainly on the supposed defect in not showing, by production of the charter, how the personal liability of Van Riper arose. That was not necessary. Had the proof, at the outset, stated that he was a *corporator*, then *prima facie* he would not have been personally liable, and it must have been shown how he came to form an exception to the general rule which exempts the member of an aggregate corporation. But the application did not state that the Belleville Bank was incorporated, nor imply that, except in the clause charging personal liability. The bank might have been a mere partnership or joint stock company; and that, I think, must have been intended upon the language of the application, had it not gone on to show how the liability arose. The common law favors the personal liability of the members for all the debts of a company. Exemption is an exception, to be shown by the other side. Strictly, therefore it was not necessary to show at all how Van Riper came to be personally liable.

But if it were necessary to show personal liability specially, it was sufficiently done. The statute does not require primary proof, but only an affidavit; nor does it demand the same particularity of statement as in a declaration. The affidavit must show that the demand arose on contract, and the amount due. These are

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the two great objects. They give jurisdiction to the commissioner so far as the debt is concerned, and may be stated in a general way. See § 3 and 4. *Matter of Hollingshead*, 6 *Wendell*, 553. *Matter of Gilbert*, 7 *id.* 490, 491.

Then is Van Riper personally liable upon the charter now shown within the meaning of the non-resident attachment statute? This is a material inquiry; for *personal* liability is made an express ingredient of jurisdiction. To this the charter is express. The president and all the directors are, by the charter, made jointly and severally liable, as individuals.

But the charter, after declaring that they shall be personally liable, immediately goes on to provide that a joint or several action may be brought, and the plaintiff may declare in a general form. It is objected that the directors being corporators and not liable at the common law, but the statute raising their liability and in the same section giving a remedy, that alone must be pursued. The answer is, that contracting as an agent and director under such a charter, is the same in legal effect as if the directors had signed and bound themselves as principal drawers or makers in their capacity as natural persons. The subsequent provision in the statute was obviously intended merely to give the plaintiff a more general and easy remedy at his option. It neither expressly denies the general remedies given by law against debtors, nor is there any rule of construction which attaches an implied denial of those remedies to such a clause. No doubt a state may pass a law tying a creditor up to a certain remedy on a contract, where the law is passed prior to the contract being made. As the creditor then knows the law, he contracts *cum onere*. But the case at bar presents no such instance. The charter does not confine the creditor to any particular remedy. It raises in his favor a debt against an individual, and leaves his remedy to the general methods of the law. This view also answers another objection taken, that the remedy given by the charter is local to the state of New-Jersey. The charter in fact institutes no remedy. It binds Van Riper as a debtor. It raises a debt against him, which may, in its own nature, be enforced wherever the

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In the matter of Anthony-street.

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debtor or his property can be found, according to the forms of law at the place where found.

My opinion is, that a complete case of unqualified personal liability is made out within the meaning of the non-resident debtor act, and that the motion to set aside the proceedings must be denied.

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In the matter of ANTHONY-STREET, in the city of New-York.

Until the *final confirmation* of a report of commissioners of estimate and assessment in the laying out or widening of streets, individuals whose property was contemplated to be taken, do not acquire any *vested rights* in respect to the damages assessed.

The corporation who set the proceedings on foot may, by leave of the court, *discontinue* them at any time before the *final confirmation* of the report; and they may do so if the report has been sent back to the commissioners for review in *one or two particulars*, although it was *approved* by the court in *most respects*.

On a motion by the corporation for leave to discontinue, affidavits showing the *impolicy* and *injustice* of granting the motion are inadmissible.

In this case the corporation presented a petition for leave to discontinue their proceedings in the above matter.

The petition stated among other things, that, on the application of the petitioners, made to this court, *May 4th*, 1837, commissioners of estimate and assessment had been appointed, who reported at the special term, in *March last*, when the petitioners moved this court that the report be confirmed. The motion being opposed, an order was directed and entered by the clerk thus: "That *the said report be referred back to the said commissioners*, for revisal and correction, by awarding to Maria Mooney by name, the value of her life estate, in one-third of the property belonging to the estate of Thomas Mooney, deceased, &c., and by reducing the sum awarded to the estate of said Thomas Mooney, to such amount as may remain, after the value of such life estate, &c., shall have been deducted. *Also*, that the said commissioners be at liberty to correct their report, by stating therein

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that, before the completion of their said estimate, &c., they obtained from the corporation, &c. profiles and plans of the adjacent streets, as to the elevation or depression thereof, &c. ; and it is further ordered, *that, in all other respects, and as to all other parties, the said estimate and assessment be and the same is hereby confirmed.*" See 19 Wendell, 678, 686, 698.

Grim, contra, offered affidavits showing the *impolicy* and *injustice* of granting the prayer of the petition.

*By the Court*, COWEN, J. If the corporation have any right to discontinue, it is the same as that of any other actor in a legal suit or proceeding. A plaintiff may, of course, and at any time before verdict, or some step in nature of a verdict, withdraw and be nonsuited ; and even after verdict the defendant cannot compel him to proceed, unless he have acquired some vested right, which will be affected by allowing the plaintiff to stop short with the verdict. He can not be questioned on account of the prejudice which a discontinuance may occasion. The right of the corporation in street cases is not distinguishable in this respect from their right as plaintiffs in an ordinary suit. Courts can not inquire into the expediency of their exercising the right ; or, if they can, they have no legal power to forbid its exercise. The affidavits are excluded.

Counsel were then heard upon the right of the corporation to discontinue, at so late a stage in the proceeding.

C. O'Connor and J. M'Keon, for the corporation.

D. Lord, jun., and S. Stevens, contra.

*By the Court*, COWEN, J. The cases heretofore decided by this court and the court of chancery, leave it quite clear that individuals acquire no vested right under these street proceedings and therefore can not insist that the corporation shall go on, *until the final confirmation* of the report of the commissioners of estimate and assessment. Kent, Ch. in *the Corporation of N*:

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*Y. v. Mapes, 6 Johns. Ch. Rep. 49. Matter of the application of the Mayor, &c. relative to Third street, 6 Cowen, 571. Hawkins v. The Trustees of Rochester, 1 Wendell 53. The People v. Brooklyn, id. 318 et sequitur, and other cases there cited. Matter of Canal street, 11 id. 154.* This view accords best with the language of the statute under which the proceedings take place. 2 *R. L. of 1813, pp. 413, 414.* By that act, so often as this court shall be dissatisfied with the report of the commissioners, it is to be referred back for revisal and correction; and on the *final confirmation* of the report, the corporation become seized; and, according to the cases, the corresponding rights of others vest.

In the case at bar, there has been no *final confirmation*, within the meaning of the act. The whole report was referred back as the statute requires it should be until we should be satisfied with it. The only difficulty raised is based on the concluding language of the rule, which declares, that the report is confirmed in all respects, excepting two particulars, wherein the commissioners were directed to make corrections. That, however, was clearly but another mode of expressing the opinion of the court, for the benefit of the commissioners and parties. It could not alter the legal effect of the reference, which was of the whole report; and indeed left the whole open for possible revisal. The confirmatory language in which the rule has been thought convenient, as indicating our approval of a certain portion of the proceedings, and the word *approved* might have been more apt than *confirmed*; but the legal result is the same. Unless specific errors are pointed out in some way, the whole ground might be travelled over, and a thousand persons be heard by the commissioners, and again by the court, though, on the first hearing, we were satisfied with all except one or two particulars. Strictly speaking, there is in any one proceeding but a single report; and what are called second or third supplemental reports, are but parts or modifications of a legal whole. As such it passes by reference between the court and the commissioners. It can not be confirmed piece-meal. The whole proceeding is entire, like a suit

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at law ; and, in a legal sense, the whole is confirmed or discontinued at a single blow. This, too, seems to me the only method of considering the matter which is feasible and just to all parties. The report of estimate and assessment alone is what we have power to review. This has reference to and is dependent on a single improvement, which can not be split into fragments, in proportion as we may from time to time allow or disallow parts of the report ; relative rights, claims and liabilities becoming vested and apportioned accordingly. .

It is true, that the proceedings on the report being entire and indivisible, a confirmation of part would be a confirmation of the whole, upon the general principle that a plaintiff or prosecutor can not split his claim. If he take judgment for a part, it is a judgment for the whole, and bars all proceeding by another suit or in the same suit for the residue. But the rule means a judgment or confirmation *final* in its legal character. Accordingly a judgment, which is in form one of nonsuit by a common magistrate, shall be held to be a nonsuit or a judgment final on the merits, and barring a second suit, accordingly as the justice had the legal right to render judgment with the one or the other effect at the time. *Hess v. Beekman*, 11 *Johns. Rep.* 457. *Ellwell v. M<sup>rs</sup> Queen*, 10 *Wendell*, 519. These cases proceed on the ground that, on given circumstances, the law directs a certain judgment to be rendered ; and that it can not be varied by the form of the entry. So in the case at bar, the law directed, on this court being dissatisfied, that the *whole report* should be referred back. It was so referred back by the rule, and the subsequent words of confirmation could not change the legal effect. Strictly the whole stood open. See per Lord *Ellenborough*, C. J., in *Strachey v. Turley*, 11 *East*, 200.

The motion to discontinue is granted.

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Evans v. Parker.

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EVANS vs. PARKER.

A sheriff's return of *nulla bona* will not be set aside as false, where the evidence produced on a motion for that purpose is contradictory in reference to the value of the property of the person against whom the execution issues over and above former liens. Indeed, it seems, that in no case will the return of a sheriff upon process be set aside as false upon affidavits, except where fraud or collusion is shown.

THIS was a motion to set aside as false a sheriff's return of *nulla bona* upon a *fi. fa.* The sheriff had made a levy, but becoming satisfied that the defendant's property was insufficient, over and above previous liens, to satisfy the execution or any part of it, he consulted with the plaintiff's attorney, and returned the *fi. fa. nulla bona*, &c. Upon which the plaintiff filed a creditor's bill in the court of chancery, obtained an injunction, and was proceeding to the appointment of a receiver. The affidavits produced on the motion to set aside as false the sheriff's return were contradictory: those on the part of the defendant tending to show that the property levied upon would have produced on a sale a sum greater than the previous liens, whilst those in opposition to the motion tended to show that a sale would not have produced any thing beyond the liens.

J. Lovett, for the motion.

A. Taber, contra.

By the Court, COWEN, J. I told the parties on this motion being mentioned, and the papers being glanced at, that I was very sure I could not give any relief in the course now taken, even if it were in fact due. It certainly is not necessary to deny that on a plain, uncontested case of collusion, we might interfere in a summary way, though I hope we have no reason to anticipate such a case. Even then it is quite obvious how much more ample would be the remedy by action, which might also be pursued *pari passu* with an indictment. As a general rule, the

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sheriff must exercise his discretion and decide for himself, whether the property on which he has levied can be made available. That he consults the plaintiff or his attorney on the question is certainly no objection; they are mainly interested in the proceeding. If it could obviously be made to pay the plaintiff's debt, I should require a very strong case to satisfy me that any member of the bar had procured the sheriff to make a false return, for the sake of enabling him to obtain the costs of a creditor's bill. It would be very harsh to suppose that any attorney would attempt such a thing; yet short of plain mal-practice or corruption, we can not interfere. I know the court of chancery have refused to regard the objection there that the return to the *fi. fa.* was false, *Stoors v. Kelsey*, 2 *Paige*, 418, and it was remarked that the defendant might apply here to set aside the return. I understand the learned chancellor also to intimate that, in a case of fraud or collusion, he would himself notice the objection. Surely we can do no more. So far as we have spoken, it was to say that the sheriff may, even after a levy, return *nulla bona* on being satisfied that an attempt to sell would be fruitless by reason of previous liens. *Chauvernois v. White*, 1 *Wendell*, 92. So of any other ground for honest belief in the sheriff, as if the goods levied on are claimed adversely by a third person, even though the claim be fraudulent. We all know the course usually taken as a remedy. It is an action by the party grieved for a false return. That was one remedy spoken of by the chancellor in *Stoors v. Kelsey*. Several cases are collected by Mr. *Graham* in his practice, 409, 2d ed. shewing that the sheriff has a discretion. It would be a very harsh mode of controlling that discretion, to set aside the return, and displace the lien which the party may have acquired by a creditor's bill. The remedies of creditors are sufficiently narrowed by the modern, and I will not deny humane, course of legislation in favor of unfortunate debtors. All remedy by *ca. sa.* is taken away in respect to resident debtors, and it is right to secure the creditor every means in his power to reach the debtor's property and convert it to the payment of his debts short of a hasty sale and sacrifice, which is not a very pro-



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bable result when the course taken is by a bill in chancery. One clear mode of relief is open to the defendant—payment of the debt. That will raise the injunction and supersede the receiver ; and if his property be so ample as to fasten the charge of a palpably false return on the sheriff, it would seem to follow that he must have the means of payment.

I took the papers and consented to look into this case, rather from the large amount of property which was said to be locked up and withdrawn from the defendant, by the bill in chancery, some fifty thousand dollars at least, and the confident belief of counsel that he had presented a case for relief, than from any hope that I can afford any. The more I have thought and read of the matter, the more I am satisfied that my first impression was correct. In *Brydges v. Walford*, 6 *Maul. & Selw.* 42, 3, Lord Ellenborough, C. J. said, "The sheriff acts according to the best information he can procure at the time, and makes his return accordingly." In the late case of *Goubot v. De Crouy*, in the Exchequer, 2 *Dowl. Pr. Cas.* 86, the sheriff's officer had arrested the defendant, who claimed to be privileged as being in the service of the Sicilian minister. The affidavits shewed very strongly that the privilege was but a pretence, and that the officer had collusively and fraudulently allowed the defendant to go at large. The sheriff returned the defendant's privilege as an excuse for not taking him. On motion to set aside the return as false, and direct the sheriff to execute the writ, the court refused to interfere, saying "you must resort to your action." The learned reporter states the rule to be extracted from the case thus : "The court will not try, on affidavits whether the return made by a sheriff to a writ is false, even though a strong case is made out shewing fraud and collusion ; but the party must resort to his remedy by action."

The motion must be denied with costs.

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Haines v. The Judges of Westchester.

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## HAINES and others vs. THE JUDGES OF WESTCHESTER.

A return to a *certiorari* cannot be contradicted by an assignment of errors, nor can a fact be specially assigned showing a want of jurisdiction in the tribunal to which the *certiorari* is sent.

*It seems* that an *assignment of errors* is a proceeding not applicable to the case of a *common law certiorari*.

In this case to a *common law certiorari* directed to the judges of Westchester county, the judges returned that the commissioners of the town of Bedford, (the parties prosecuting in the *certiorari*,) on an application to them for that purpose had refused to lay out a certain road; that on such refusal an appeal was made to three of the judges of the court of common pleas of the county, a majority of whom reversed the decision of the commissioners, and laid out the road according to the original application. On the coming in of this return, the commissioners assigned for error that the road, as laid out by the judges, was not the same as that applied for and passed upon by the commissioners. A motion was made to set aside the assignment.

*S. Stevens*, for the motion.

*M. T. Reynolds*, contra.

*By the Court*, COWEN, J. The motion must be granted with costs. The return cannot be contradicted by an assignment of errors. It must be taken as conclusive, and acted upon as true. If false, you must go to your action. *Vide per Platt, J. in Rawson v. Adams*, 17 *Johns. R.* 131. — *v. Cowper*, 6 *Mod.* 90.

It is supposed that an assignment of a want of jurisdiction constitutes an exception to the rule. That is certainly not so, where the officers return that they have jurisdiction; nor am I aware that an issue has ever in any case been raised upon jurisdiction by an assignment of errors. A want of jurisdiction appearing on the return, the proceedings will be reversed on

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motion, without any assignment of errors, which is not applicable to a common law certiorari. See 1 Cowen, 28, n. If there be in fact a want of jurisdiction, an action lies not only for a false return shewing it, but for any injurious proceeding in consequence of the adjudication by the inferior tribunal.

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 FERRIS vs. DOUGLASS.
 

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A writ in the nature of a writ of error *coram nobis* can properly issue only by order of the court, upon cause shown by affidavit, and after notice to the opposite party or his attorney.

The writ will not of itself operate as a stay of proceedings; to render it such, an order of the court is necessary, which will be granted on cause shown in the same papers on which the principal motion is founded.

In general, a stay will be ordered only on putting in and justifying bail; and then the provisions of the statute concerning bail on writs of error *coram nobis*, should conformed to by the party as nearly so as practicable.

A certificate of counsel of error in the record and proceedings is not necessary on the suing out of this writ; nor need bail be given unless a stay of proceedings is desired.

Where a writ was issued without the allowance of the court, and a motion was made to quash it, an allowance *nunc pro tunc* was ordered to save the attaching of the statute of limitations.

THE plaintiff sued out a writ in the nature of a writ of error *coram nobis*, to reverse a judgment rendered against him by default, and which was docketed 6th January, 1837. The writ of error was filed in the office of one of the clerks of this court on the sixth day of May, 1839. The plaintiff assigned as error in fact, *infancy* at the time of the rendition of the judgment. A motion was made to quash or set aside the writ; it appearing that it had not been ordered or allowed by the court, that there was no certificate of counsel on file, and that bail in error had not been put in. In opposition to the motion it was shown that the plaintiff in error became of age on the eighth day of May, 1837, and it was urged, if the writ should be holden to have been issued irregularly, that it ought to be amended by an allowance *nunc pro tunc*, as otherwise the plaintiff would be barred by lapse of time of availing himself of the error in judgment.

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 Ferris v. Douglass.
 

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*M. T. Reynolds*, for the motion.

*J. Holmes, jun.* contra.

*By the Court*, BRONSON, J. We have already had occasion to say that this writ, for error in fact in this court, is not abolished. *Smith v. Kingsley*, 19 *Wendell*, 620. But some parts of the statute concerning writs of error do not apply. A certificate of counsel, that there is error in the record and proceedings is not necessary. The statute requiring bail in error does not extend to this writ. This is agreed in all the books.

The writ can only be issued on motion to this court, and cause shown by affidavit. It must appear with reasonable certainty, that there has been some error in fact, before the writ will be allowed. Notice of the motion should, as in other cases, be given to the opposite party or his attorney, or some good reason for omitting notice should appear by affidavit. *Sayer*, 166. 1 *Lilly Pr. Reg.* 710. 2 *Crompt. Pr.* 377. 2 *Archb. Pr.* 243, 4. 2 *Sel. Pr.* 401, 2. 2 *Tidd. Pr.* 1199. *Carth.* 368, 370.

Although the statute requiring bail in error does not extend to this writ, an opinion was intimated in *Smith v. Kingsley*, that, to make the writ operate as a stay of execution, bail ought, as a general rule, to be required. In *Ribout v. Wheeler*, *Sayer*, 166, it was said that the writ is not a *supersedeas* in itself; "but although it be not, execution cannot be taken out upon the judgment whilst it is depending, without leave of the court." In *Walker v. Stokoe*, *Carth.* 367, the writ was allowed by the court and a *supersedeas* granted, upon putting in bail. But a previous writ of error had been quashed. Mr. Tidd says, the writ is or is not a *supersedeas* of execution, according to circumstances; but what those circumstances are, is not very clearly explained. In general, he says, when a writ of error abates by the act of God; as by the death of the parties, a second writ of error is a *supersedeas* of itself, without motion or leave of the court: but the cases to which he refers were upon the common writ of error. 2 *Tidd's Pr.* 1209, *Phil. ed.* 1828. In 1 *Lilly's Pr. Reg.* 710,

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It is said that the writ is allowed in court without bail ; " and upon a motion at the side bar, the court have granted a *superse-deas*, because none of the statutes which oblige the plaintiff to put in bail extend to this writ of error." This language plainly implies that the writ is not a *supersedeas* in itself. *Archbold* says, "a writ of error *coram nobis* is in some cases of itself a *supersedeas*, in some not : " but, like Mr. *Tidd*, he only mentions a single case where it will operate as a stay, to wit, when brought after the abatement of a former writ. He adds—"where error in fact is intended to be assigned, the writ of error will not be of itself a *supersedeas*." But where not a stay, the court on motion will grant a stay of proceedings on putting in and perfecting bail. "This forms a part of the rule of allowance." 1 *Archb. Pr.* 244. 2 *Tidd's Pr.* 1209. That the writ is not a *supersedeas* of execution without leave of the court, see also 2 *Cromp. Pr.* 377.

In *Birch v. Triste*, 8 *East*, 415, it was said by Lord Ellenborough, that "in error of matter of fact *coram nobis*, which is not within the statute requiring bail in error, the writ of error is not of itself a *supersedeas* in the first instance ; but is or is not so, according to circumstances ; and those circumstances the court will enquire into, on motion for leave to take out execution." *Sellon* says, 2 *Sel. Pr.* 401, "It is generally laid down in books of practice, that this writ does not operate as a *superse-deas*, and that no bail is ever required thereon ; but in Mr. *Impey's Practice*, which I take to be correct, the contrary is holden ; and the mode of proceeding is to get the writ allowed and serve notice of the allowance on the opposite attorney, "which shall operate as a *supersedeas*, upon the plaintiff in error putting in and justifying bail."

Whether such a proceeding is applicable at the present day, we need not now inquire, but formerly error in the process, or through default of the clerks, might be corrected by writ of error returnable in the same court ; and it was, I think, in those cases, if any, that the writ operated as a *supersedeas* without an order of the court. Where the plaintiff intended to assign some error

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in fact, such as infancy, coverture, or the like, the writ was never, I think, a stay in itself. Whether the court would order a stay of proceedings on the judgment or not, depended on the special circumstances of the case, and, as a general rule, it would only be ordered upon putting in and perfecting bail.

It was said in *Sayer*, that although not a *supersedeas*, execution could not be taken out while the writ was depending without leave of the court; and in *Birch v. Triste*, 8 *East*, 415, Lord Ellenborough said the court would enquire into the circumstances on a motion for leave to take out execution. In 1 *Arch. Pr.* 244, it is said, that the order to stay on putting in and perfecting bail, forms a part of the rule of allowance. On this and some other points, the practice seems not to be very definitely settled in England; and we are at liberty to adopt such a course, not inconsistent with established principles, as may be best calculated to attain the ends of justice, without unnecessary delay or vexation. As these writs have, for some reason, become much more common of late than they were formerly, we have considered the proper course of practice in this court somewhat more at large than was necessary in disposing of the present motion.

I have already said, that the writ must be allowed by this court, on motion, of which notice should be given to the opposite party or his attorney. The writ will not, of itself, operate as a stay of proceedings on the judgment. If the plaintiff in error wishes a stay, he should make that a part of his motion for the allowance of the writ, stating the facts on which the stay is asked, to the end that the opposite party may have an opportunity to answer. In general, a stay will only be ordered on putting in and justifying bail. Where a stay is ordered on those terms, the plaintiff in error must follow, as near as practicable, the provisions of the statute concerning bail in error, in cases where the writ of error is returnable in this court, and a stay of proceedings is intended. Although the statute does not, of its own force, apply to this proceeding, we are at liberty to adopt it, and thus render the practice uniform in all cases in relation to bail in error.

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Miller v. Franklin.

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In the case at bar, the writ was issued irregularly, without an allowance by the court. But it now appears that there was error in fact, to wit, infancy of the defendant below at the time the judgment was rendered by default without appearance. And as he will be remediless if the writ is quashed, the statute having now run, and the practice in such cases seems not to have been very well understood, we think the writ should be *allowed* as of the time it was filed, *nunc pro tunc*, on payment of the costs of the motion. No stay of proceedings on the judgment is asked. If the costs of the motion are not paid in 20 days, the writ of error is quashed.

Ordered accordingly.

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MILLER vs. FRANKLIN.

A party who takes an assignment of a verdict from the plaintiff in a cause, during the pendency of a motion for a new trial, as collateral security for the payment of a debt and for responsibilities assumed, and a new trial is subsequently granted and judgment as in case of non-suit afterwards obtained by the defendant for the neglect of the plaintiff to bring the cause to trial, *the assignee is not liable to the costs of the defence* if after the assignment he takes no part in the prosecution of the suit, and even if he does, *it seems* he would not be liable. *It seems*, had the plaintiff on the record retained no interest whatever in the subject matter of the assignment, that the assignee would have been held liable.

MOTION by the defendant that *Nathan Randall* pay the costs of this action, on the ground that he was the *assignee* of the demand for the recovery of which the suit was prosecuted, judgment having been rendered for the defendant for costs amounting to \$518.91. The action was brought by the plaintiff against the defendant as sheriff of Chenango, to recover a penalty of \$250, for making deliverance in an action of replevin after a claim of property, without first trying the right. The cause was tried in May, 1834, and a verdict found for the plaintiff for the penalty. The circuit judge refused a new trial, and judgment for the plaintiff was perfected on the verdict. The case then came before this court on appeal from the circuit judge, and a new trial was ordered at May term, 1837. The cause was afterwards three

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times noticed for trial, but not tried, and in June, 1839, the defendant obtained a judgment as in case of nonsuit.

On the 7th February, 1837, after the case had been argued in this court and before the decision, the plaintiff made an assignment of the claim to *Randall* by a writing, which, after entitling the suit, was as follows: "Verdict for \$250 in May, 1834, for plaintiff, case made by defendant, and decded by Judge Monell in favor of the plaintiff—carried to supreme court by defendant—yet undecided. In consideration of the sum of two hundred and fifty dollars to me paid by Nathan Randall, I hereby assign and transfer to him all my right, claim or interest in the above verdict and judgment. February 7, 1837. *Albert Miller*."

Miller was indebted to Randall, and had been called on to pay or give security. Randall had also endorsed a note for Miller, which he afterwards had to pay. The assignment was made by way of *security*, the avails, if any, to be applied to Miller's debt and the liability of Randall as endorser. It was understood at the time that Randall was to have nothing to do with the further prosecution of the suit, and that he was not in any way to be liable for costs. Randall did not in fact take any part whatever in the subsequent prosecution of the suit; but on the contrary, when the plaintiff's attorney called on him for that purpose, (the plaintiff himself being absent) he refused to take any charge or have any thing to do with the suit.

On one occasion the circuit judge refused to try the cause on the ground that Randall, who was his relative, was assignee of the claim. The defendant's attorney wrote a letter to Randall mentioning this fact, and enquiring how they should get the cause tried, and asking on what terms R. would settle the suit. In January, 1838, Randall wrote an answer, saying if the judge would not try the suit, he was willing to change the venue to another connty, though his interest was such that the judge might try it. He added, that he should be a loser by Miller if he got the whole, but he would assign or cancel the judgment, if he had the power to do so, for \$200. This was the only thing that Randall ever did in relation to the prosecution of the suit.



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Miller v. Franklin.

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*J. Edwards & A. Taber*, for the motion.

*M. T. Reynolds*, contra.

*By the Court*, BRONSON, J. When one man, as assignee or as beneficially interested in the demand, brings an action in the name of another, he is liable for the costs which may be adjudged to the defendant; and is also bound to indemnify the plaintiff on record. 2 R. S. 619, § 44. 20 Johns. R. 475. 2 Cowen, 460. 18 Wendell, 672. 7 Id. 457. An assignee is liable to the defendant for costs, although the assignment is made pending the suit, if he afterwards proceeds in the action, *Schoolcraft v. Lathrop*, 5 Cowen, 17; and in such a case he takes the demand *cum onere*, and is liable for the costs which had accrued *before*, as well as those which may arise *after* the assignment. *Jordan v. Sherwood*, 10 Wendell, 622. But the mere fact of taking an assignment pending the action, will not, I think, make the assignee liable, unless he afterwards carries on the suit. What will amount to a prosecution of the suit, may sometimes be a debatable question. If the assignment is absolute, so that the plaintiff on record no longer has any interest, it cannot be necessary to prove that the assignee was actively engaged in the further progress of the litigation; it will be enough to show that he knowingly suffered the suit to proceed for his benefit.

In this case, the assignment, though absolute in terms, was taken by way of collateral security for the debt due to Randall, and as an indemnity against his liability as endorser for the plaintiff. It was expressly understood at the time that Randall was not to be answerable for the costs, or to have any thing to do with the suit; but if anything was obtained, he was to apply the money to the liquidation of his claims against the plaintiff. Randall would be liable to account to the plaintiff for the money which he might receive, and to pay over any surplus that might remain after satisfying his demands. The transaction amounted to little more than an order for the payment of any money that might be collected. A recovery in the action would increase

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the security of Randall ; but that was all the interest he had in the matter. The interest of the plaintiff on record was just as great after, as it was before the assignment. It was still his suit, and was, in effect, carried on for his benefit. Under such circumstances we think the assignee is not liable to the defendant for costs ; that he would not be liable, even if he had co-operated with the plaintiff or his attorneys, in carrying on the suit. But that Randall has not done. The letter he wrote in answer to one received from the defendant's attorney, is not inconsistent with the account which he now gives of the transaction ; and upon the most material points he is supported by the affidavits of other persons. The statement of the plaintiff Miller is not only denied by Randall and a third person, but it is contradicted by the assignment itself. It is of no importance that Miller was away while the suit progressed. It was carried on by his attorneys, and for his benefit. When Randall was applied to by one of the plaintiff's attorneys, he refused to take the charge, or to have anything to do with the suit. It is impossible, under such circumstances, to hold him liable for costs.

Motion denied.

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ALLEN vs. MAPES.

On setting aside an *inquest* taken at the circuit, the court will not, in addition to the usual terms of relief, impose the condition that the defendant shall abandon the defence of *usury*, or of the *statute of limitations*, if either of such defences has been interposed.

On a motion to set aside an *inquest* taken at the circuit, where the default of the defendant was satisfactorily excused, it was shown on the part of the plaintiff that the defence relied on by the defendant was *usury*, in the making of the note the foundation of the action, and it was insisted that in addition to the usual terms of relief, the defendant should be required to relin-

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quish the defence of usury. This was asked on the authority of the case of *Fox v. Baker*, 2 *Wendell*, 244.

*P. Cagger*, for the motion.

*A. Taber*, contra.

*By the Court*, BRONSON, J. It is, no doubt, the constant practice in these appeals to the equity powers of the court, to impose such terms on granting relief as the special circumstances of the case may seem to require ; and where a defendant has let slip the opportunity of pleading what has sometimes been called an unconscionable defence, as the statute of usury or of limitations, leave to plead anew has been denied. *Beach v. Fulton Bank*, 3 *Wendell*, 585, 587, and cases cited, *per Savage, Ch. J.* There may be cases where, in the exercise of a sound discretion, we should refuse to set aside an inquest regularly taken, or to grant any other favor to the defendant which would enable him to set up a hard and inequitable defence. But here the defendant does not ask to add a new plea ; his defence was interposed at the proper time, and it has been lost by the mere accident that his counsel forgot to prepare an affidavit of merits in due time. There has been no delay. The plaintiff may still have a trial as soon as it could have been obtained if the cause had taken its regular course on the calendar. If we impose a condition requiring the defence of usury to be abandoned, we must, in effect, say that any accident by which the plaintiff obtains a regular default will always exclude this defence. I cannot go so far. Whatever we may think of the policy of the statute against usury, it is our duty to enforce it so long as it remains on the statute book. The nature of the defence should never be taken into consideration in granting applications of this kind, except under very special circumstances. It is questionable whether the facts are fully stated in *Fox v. Baker*. But however that may be, the case, as reported, has not been followed. Relief has often been granted, where the defence was usury or the statute of limitations, without imposing any such

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terms as the plaintiff asks in this case. The inquest must be set aside on the usual terms of paying the costs of the circuit and subsequent proceedings, including the costs of opposing this motion.

Ordered accordingly.

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In an action of ejectment, where several parcels of land are claimed in the same declaration, and the defendant concedes the plaintiff's right to recover as to some, and denies it as to others of the parcels, the court on motion will, on terms, strike from the declaration the parcels, the right of the plaintiff to which is conceded, and leave the parties to litigate only as to the others.

THIS was an action of *ejectment for dower*, in which the plaintiff claimed to recover several distinct parcels of land. The defendants admitted her right to recover two of the parcels described in the declaration, but denied her right as to the residue. They therefore applied to the court for leave to surrender the two parcels, and that as to those all further proceedings be stayed.

THE COURT, after advisement, made an order, that the two parcels in respect to which the right of the plaintiff was conceded, be struck from the declaration, upon payment of costs and upon the defendants *surrendering* the possession of the two parcels and delivering to the plaintiff a *stipulation* that the *mesne profits* of those parcels be assessed at the same time that the mesne profits of the other parcels be assessed in case the plaintiff shall recover in respect to such other parcels; and if he do not so recover, then that they be assessed in like manner as if judgment had passed in favor of the plaintiff for the two parcels stricken from the declaration.

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## WALKER vs. SHERMAN.

Where in the *partition of real estate* belonging to *tenants in common*, and consisting in part of a *woollen factory*, the commissioners treated part of the machinery found in the factory as *personal property* and not as belonging to the *realty*, the court on motion confirmed their report; it not appearing that the machinery in question was in any manner *affixed* or fastened to the building or to the land. Cases arising under the *law of fixtures* collected and commented upon.

C. P. KIRKLAND, for the defendant, moved to set aside the report of commissioners in partition, on the ground that they had improperly made partition between the parties, who were tenants in common, in equal moieties, of a woollen factory, a house, barn, and twenty acres of land. He read affidavits tending to show that the premises were so circumstanced, as not to admit of a just and equal partition, and that they should therefore have been sold. But, if otherwise, that the commissioners in making partition had mistook the character of several articles of machinery belonging to the mill, considering them as *personal property*, whereas they should have been regarded as *real estate*, and had in effect, therefore, passed to the plaintiff, to whom the mill and its appurtenances were awarded and set off in severalty, with six acres of land and one-half the barn; the residue, including the dwelling-house, being set off to the defendant. The affidavits tended to show other inequalities, and fifteen affidavits were produced in which the deponents expressed their general opinion that the premises could not be divided without great prejudice to the owners.

The partition was made while the defendant was absent, he being a resident of the state of Missouri, whence he had returned to this state to attend an auction of the premises in question, under the impression that the commissioners would report in favor of a sale. Before proceeding to Missouri, he appointed an attorney to take charge of the suit. One of the commissioners, Mr. Goodrich, made affidavit that separating, from the premises the loose machinery as being personal property, the commission-

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ers concluded that partition of the residue, which alone they considered real property, could be made without prejudice ; otherwise not. Mr. *Smith*, another of the commissionere, made oath, that those parts of the machinery which were thus separated, consisted of *two double carding machines, a picking machine, shearing machine, spinning machine, looms, &c.*; and concurred, that if they were not to be considered personal property, the commissioners would have been under the necessity of reporting the premises so situated that a partition could not be made. These machines, according to the defendant's affidavit, had been used and passed from one owner of the factory to another as parts of the factory, for eleven years or more, the same as if they had been actually annexed ; and he expressed his opinion that they were parts of the factory.

*L. Walker*, contra, read affidavits admitting that the above articles were excluded from the estimate of the commissioners, as being personal property ; and tending strongly to show that, being thus excluded, the partition was fairly made. These affidavits went very fully to contradict or explain away all the facts alleged in the defendant's affidavits which were relied on as impeaching the propriety or justice of the partition, except the fact of treating the above articles omitted in the estimate as personal property. The affidavits further shewed that the commissioners met several times and heard the counsel and agents of the parties, making surveys, and giving the case very full consideration ; that the plaintiff's counsel, at these meetings, admitted that all the machinery belonging to the parties and *affixed to the freehold* was real estate ; otherwise of machinery, which was loose and moveable, viz. *carding machines, a picking machine, a shearing machine, a spinning jenny, a spinning billy and a loom*, which were in the factory, but not in any manner affixed or fastened to the buildings or lands. The commissioners acted on this distinction.

*B. D. Noxon*, on same side.

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*By the Court,* COWEN, J. Judging from the affidavits before us, the machinery which the commissioners excluded as being personal property, was such only as was moveable, and in no way physically attached to the factory or land, though it had been used for several years, as belonging to the factory, and was as material to its performance in certain departments of its work, as the machinery which was actually affixed. Did the commissioners err in disregarding the moveable machines? That is the only question. If they were right, the equality and justice of the partition are apparent upon the proofs; if wrong, the report should be set aside, and the commissioners be required to review their decision.

The question is one between tenants in common, the owners of the fee; and is, we think, to be decided on the same principle as if it had arisen between grantor and grantee, or as if partition had been effected by the parties through mutual deeds of bargain and sale. As between such parties, the doctrine of fixtures making a part of the freehold, and passing with it, is more extensively applied than between any others. As between tenant for life or years and reversioner or remainder-man, all erections by the former for the purposes of trade or manufactures, though fixed to the freehold, are considered as his personal property, and as such, may be removed by him during his term, or be made available to his creditors on a *fieri facias*. On his death, they go to his executors or administrators; yet by a conveyance, they pass to the vendee. *Fructus industriales*, it is well known, always go, on the owner's death, to the executor or administrator, not to the heir; whereas, they are carried by a devise or other conveyance of the land, to the devisee or vendee. *Spencer's case*, *Winch's Rep.* 51. *Austin v. Sawyer*, 9 Cowen, 39. *Wilkins v. Vashbinder*, 7 Watts, 378, and the cases there cited overruling *Smith v. Johnston*, 1 Pennsylv. Rep. 471, *contra*. The general rule is, that any thing of a personal nature, not fixed to the freehold, cannot be considered as an incident to the land, even as between vendor and vendee. The English cases on this subject are, most of them, well collected and arranged in *Amos*

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& *Ferard's Law of Fixtures*, p. 1, ch. 1, and p. 180, ch. 5, *Am.* ed. 1830. For some still later, see *Gibbon's Law of Fixtures*, 15, ch. 2. The American cases are mostly collected in 2 *Kent's Comm.* 345, 3d ed. note c. I have said, that as a general rule, they cannot be considered an incident unless they are affixed. This is not universally so. A temporary disannexing and removal, as of a millstone to be picked, or an anvil to be repaired, will not take away its character as a part of the freehold. Locks and keys are also considered as constructively annexed; and in this country it must be so with many other things which are essential to the use of the premises. Our ordinary farm fences of rails, and even stone walls, are affixed to the premises in no other sense than by the power of gravitation. It is the same with many other erections of the lighter kind about a farm. I shall hereafter have occasion to notice these and a few other like instances of constructive fixtures. I admit that some of the cases are quite too strict against the purchaser; but as far as I have looked into them, and I have examined a good many, both English and American, they are almost uniformly hostile to the idea of mere loose moveable machinery, even where it is the main agent or principal thing in prosecuting the business to which a freehold property is adapted, being considered as a part of that freehold for any purpose. To make it a fixture, it must not only be essential to the business of the erection, but it must be *attached to it* in some way; at least, it must be mechanically fitted, so as, in ordinary understanding, to make a part of the building itself.

The question has been occasionally examined in this court as between grantor and grantee, and in some other relations. The most material cases are *Heermance v. Vernoy*, 6 *Johns. Rep.* 5; *Cresson v. Stout*, 17 *Johns. Rep.* 116, 121; *Miller v. Plumb*, 6 *Cowen*, 665; *Austin v. Sawyer*, 9 *Cowen* 39; and *Raymond v. White*. 7 *id.* 319. None of them treat a personal thing as a fixture short of physical annexation; and some are peculiarly strong against the purchaser. The first related to a sale of land, on which was a bark-mill, and a stone for grinding bark, to be used in a tannery. The court said, it seems to be the better



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opinion that the mill was personal property : for the mill-stone, with the building covering it, was necessary to the tanning business, a matter of a personal nature. Taken upon that reason, a saw-mill or grist-mill would hardly have passed by such a conveyance ; yet it has been settled ever since the Year Book, 14 Henry 8, 25, that the stones of a grist mill are a part of the freehold, though removed for the purpose of being picked ; and they shall pass by a sale of the land. *Amos & Ferard on Fixtures*, p. 183. In *Cresson v. Stout*, Mr. Justice Platt expressed his opinion, that frames in a factory for spinning flax and tow, though fastened by upright pieces extending to the upper floor, and cleets nailed to the floor round the feet, neither of the machines being nailed to the building, would not be considered as a part of the freehold. He thought, therefore, that they might be levied on as personal property, under a *fi. fa.* against the owner. But the question was not finally decided. Had the judgment debtor been a mere tenant for life or years, the machinery erected by him would doubtless have been subject to execution against him. But he appears to have owned the fee, subject to a mortgage.

In the case of *Swift v. Thompson*, 9 Conn. R. 63, the dictum of Platt, J. was followed with respect to cotton machinery, the posts of which were fastened to the floor by wooden screws set into the floor. By unscrewing, the machinery could be removed without injury to the building. *Daggett*, J. said, " We resort, then, to the criterion established by the common law ; could this property be removed without injury to the freehold ? The case finds this fact. This, then, should satisfy us." The views of the learned judge are sustained by the strong case of *Gale v. Ward*, 14 Mass. R. 352. There, the owner of the freehold had carding machines in his woollen factory, " not nailed to the floor, nor in any manner attached or annexed to the building, unless it was by the leather band which passed over the wheel or pulley, as it is called, to give motion to the machines. This band might be slipped off the pulley by hand, and it was taken off, and the machines removed from time to time, when

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they were repaired. Each machine was so heavy as to require four men to move it on the floor, and was too large to be taken out at the door. But it was so constructed as to be easily unscrewed and taken in pieces; and the machines were so taken in pieces, when removed by the deputy sheriff." He had levied upon them as being the personal property of the freeholder, entirely distinct from the realty. *Parker*, Ch. J. said, "They must be considered as personal property, because, although in some sense attached to the freehold, yet they could easily be disconnected, and were capable of being used in any other building erected for similar purposes. It is true, that the relaxation of the ancient doctrine respecting fixtures has been in favor of tenants against landlords; but the principle is correct in every point of view." But see *Union Bank v. Emerson*, 15 *Mass. R.* 159, and *Whiting v. Brastow*, 4 *Pick.* 310. *Gale v. Ward* is questioned by Richardson, Ch. J. in *Kettredge v. Woods*, 3 *New-Hamp. R.* 506. Some of the doctrine in *McLintock v. Graham*, 3 *McCord*, 553, was equally strong with that in *Gale v. Ward*. A still was fixed in a rock furnace, which furnace was built inside and against the wall of a house that had been erected for the express purpose of a still. The whole stood on a tract of land sold under a *fi. fa.* against the owner, and the court said the still did not pass. But there was evidence of the still being excepted at the sheriff's sale, and sold to another; so that the question did not rest entirely on annexation. Besides, as to this point, the case was afterwards shaken by *Fairis v. Walker*, 1 *Bail.* 540, which I shall presently notice more at large. Hutchinson, Ch. J. in *Wetherbee v. Foster*, 5 *Verm. R.* 142, denied that pot ash kettles set in brick arches, with chimneys, are real estate. But he cited no authority. The case of *Duck v. Braddyb*, 1 *McClel.* 217, 13 *Price*, 455, treats cotton machinery, placed and fastened for the purposes of stability, by a tenant for years in a manufactory, as subject to be distrained by his landlord for rent, and to be taken in execution against him. This, doubtless, was so under the peculiar circumstances of that case. Mr. Gibbons remarks, upon this case, *Gibbons on Fixtures*, 20, that such machinery

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would seem not to be a fixture, if fastened by bolts or screws, and capable of being removed and replaced without injury, either to the machinery or the building. But the question, whether it should be deemed a fixture as between the owner of the freehold and his devisee or grantee could not arise; and, according to the report in *Price*, the court expressly refused to pass on the question of fixture; according to *McClelland*, they silently omitted to notice the point.

The third case which I noticed as decided in this court was *Miller v. Plumb*. This regarded an ashery; and the court recognized and acted on the general distinction, that things in any way fixed to the freehold, e. g. potash kettles set in an arch of mason work with a chimney, though the arches were placed on a platform and not fastened to the building, would pass by a sale of the premises; but it was held, that small kettles, not fixed in any way, though necessary for use in the ashery, would not pass. The distinction between the relation of vendor and vendee, tenant and landlord, was distinctly considered and recognized. See also *Reynolds v. Shuler*, 5 *Cowen*, 323. The same distinction was held by Savage, C. J. in *Raymond v. White*. The question there was in respect to a heater used in a tannery, but in no way attached to the building. It was placed in a leach or vat, which latter was detached from the building, except that a small piece of board was tacked with nails to the vat and to the side of the building. But there was no necessity for fastening the vat, and the fastening was of no use, except to keep the side standing while the vat was put together." The question was really one between landlord and tenant. But Savage, C. J. said the heater could not be considered as part of the realty, even if the person who placed it had owned the tannery. 7 *Cowen*, 321. In *Kirwan v. Latour*, 1 *Harr. & Johns*. 289, the sheriff had sold under a *fi. fa.* against the owner, a house and lot with the appurtenances. This house was built for a distillery; and the implements necessary to carry on the business were on the premises at the time of the sale. In trover by the owner for these, the court held that the pumps, cisterns, iron grating, door,

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distillery and horse mills passed by the sheriff's deed, but not the joists, vats, buckets, pickets and faucets. The case went on the distinction between things affixed to the freehold and the mere loose utensils necessary for carrying on the business. The former were held to pass, though Chase, J. conceded that a tenant erecting them might have taken them away. It being as he said the same as a question between ordinary vendor and vendee, "every thing passed which was annexed to the freehold." *Id.* 291. The same thing was said as to the fixtures in an iron-foundry. *Hare v. Horton*, 5 *Barn. & Adol.* 715. Park, J. said, "Prima facie, a mere conveyance of the foundry would have passed them." Taunton, J. said, if the deed had only mentioned the foundry, the fixtures would have passed. "There are many cases which show this." Patterson, J. said, "I should be sorry to bring into question the decision of this court, that a conveyance of premises will pass all that is attached to them." And the *Union Bank v. Emerson*, 15 *Mass. R.* 159, narrows the general reasons of *Gale v. Ward*. It holds that a kettle fixed in brick work in a fulling mill passed to the mortgagee of land, on which the fulling mill stood, though the appurtenances were not mentioned. The court recognized the usual distinction in favor of tenants. So they did in *Whiting v. Brastow*, 4 *Pick.* 310. In *Fairis v. Walker*, 1 *Bail.* 540, the plaintiff sold and conveyed his plantation to the defendant. On this, cotton was grown; and a cotton gin was in a gin house on the premises attached to the gears. The plaintiff brought trover for the gin; but the court were of opinion that it was a fixture, and passed with the freehold. They said that, as between heir and executor or vendor and vendee "All things which are necessary to the full and free enjoyment of the freehold and are in any way attached to it, are held to be fixtures and pass with it." In the case of the *Olympic Theatre*, 2 *Browne*, 279, 285, the court said, "The permanent stage is so fixed to the freehold, that it ought to be considered as a part of it. But the movable scenery and flying stages are not necessary accessories to the enjoyment of the inheritance. They were only necessary for the purposes of

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theatrical exhibitions, which in this respect must be considered as a species of trade. We are, therefore, of opinion, that they do not belong to the inheritance, and consequently are not subject to the liens, particularly when conflicting with the claims of execution creditors." The court recognized the distinction in favor of tenants; but they appear to consider the rule as also very strict against the heir when the question arises between him and the executor, which has been said to be the same in respect to fixtures as between vendor and vendee. Spencer, C. J. in *Holmes v. Tremper*, 20 Johns. R. 30. *Miller v. Plumb*, 6 Cowen, 665. In the case of the *Olympic Theatre*, the court say, 2 Bowne, 285, "The general rule appears to be, that where the instrument or utensil is an accessory to any thing of a personal nature, as to the carrying on a trade, it is to be considered a chattel; but where it is a necessary accessory to the enjoyment of the inheritance, it is to be considered as a part of the inheritance; a rule as broad as that stated in *Heermance v. Vernoy*; and which has since been utterly repudiated by the *Pennsylvania* cases. In *Gray v. Holdship*, 17 Serg. & Rawle, 413, a copper kettle or boiler in a brew house was held to be a part of the freehold, though very slightly attached; and the court mention the wheels, stones and bolting cloths of a mill as parallel and familiar instances. *Id.* 415. So the engine by which a steam saw mill is propelled, thus performing the usual office of a water-wheel. The court mentioned the gears of a mill as part of the freehold. *Morgan v. Arthurs*, 3 Watts, 140. And see *Lemar v. Miles*, 4 Watts, 330, S. P. admitted. So a steam engine with all its fixtures, used to drive a bark mill in a tannery, being erected by the owner of the freehold, was held to pass by a sale of the latter. *Ives v. Ogelsby*, 7 Watts, 106. In *Massachusetts*, two stoves fixed to the brick work of a chimney were held to pass. *Goddard v. Chase*, 7 Mass. R. 432. In *Gibbons on Fixtures*, 17, the learned author remarks that "In *Horn v. Baker*, 9 East, 215, it was not doubted but the distillers' vats supported upon brick work and timber, but not let into the ground, and vats standing on horses or frames of wood, were goods and chattels; and that

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stills set in brick work and let into the ground were fixtures. He adds that a copper merely resting on a brick work socket and a water-butt standing on the ground or a wooden stool, are not fixtures. Otherwise if the copper were fastened in brick work.

A deed conveying a *saw-mill* was held to pass a *mill-chain*, dogs and bars, they being in their appropriate places at the time. *Fanar v. Stackpole*, 6 *Greenl.* 154. The great difficulty arose as to the *chain*. This was attached by a hook to a piece of a draft chain, which was fastened to the shaft by a spike. The chain was prepared for being hooked and unhooked at pleasure. The premises in question were here conveyed as a saw-mill *eo nomine*. The chain was commonly used in drawing logs into the mill. The court, therefore, thought that it might pass as being essential to the mill, and therefore included in the terms of the conveyance. But, they added, "we are also of opinion, that it ought to be regarded as appertaining to and constituting a part of the realty." See, in connection with this, the remarks of *Hart*, Vice Ch. near the close of his opinion in *Lushington v. Sewell*, 1 *Sim.* 435, as to what will pass by the devise of West India land by the name of a plantation.

Certain things are fixtures or not, in their own nature, independent of the fact of annexation. Accordingly, some things which are entirely detached from the freehold are, notwithstanding, holden constructively to belong to and pass with it. Such cases arise where the fixture is detached for some temporary purpose. We before noticed the removal of a mill-stone to be picked as one instance. *Amos & Fer. on Fixt.* 183. So, where the stones and irons of a grist-mill were accidentally detached by a flood carrying away the main body of the mill, they were still holden to continue a part of the realty, and therefore not to be seizable on *fi. fa.* at the suit of a creditor, as personal property. *Goddard v. Bolster*, 6 *Greenl.* 427. On the other hand, articles of furniture moveable in their nature are not fixtures, though attached by screws, nails, brackets, &c. Such are hang-

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ings, pier glasses, chimney glasses, book cases, carpets, blinds, curtains, &c. *Gibbons on Fixtures*, 20, 21.

Whatever its use or object, however, unless the thing were physically annexed to the freehold in some way, it has in general been held not to pass even as between vendor and vendee. This was held of a stove standing on the floor during winter, the funnel running into the chimney, but being loose, and not plastered in. The stove was up at the time of the conveyance. *Williams v. Bailey*, 3 *Dane's Abr.* 152. So of a padlock, and loose boards used for putting up corn in the bins of a corn house, said in *Whiting v. Brastow*, 4 *Pick.* 311. So of a heater, placed loose in the vat of a tannery. *Savage*, Ch. J. in *Raymond v. White*, before cited. The case of the stove has been questioned, as I shall notice hereafter.

The cases of constructive annexation, where the article is seldom or never corporally attached to the realty, are few, and may be set down as exceptions to the general rule. They are said to be the charters or deeds of an estate and the chest containing them, deer in a park, fish in a pond, and doves in a dove house. 2 *Com. Dig. Biens*, B. 6 *Greenl.* 157. 3 *Dane's Abr.* 156. 3 *New-Hamp. R.* 505. The deer, fish and doves are set down by *Amos & Fer. on Fixt.* 168, as *heir looms*; and so of various other animals. *Heir looms* are a class of property distinct from *fixtures*. But "the doors, windows, locks, keys and rings of a house will pass as fixtures, by a conveyance of the freehold, although they may be distinct things; because they are constructively annexed to the house." *Amos & Fer. on Fixt.* 183, and the books there cited. Many other obvious cases may be supposed. One is, our ordinary Virginia fence on country farms. No vendor would consider that as mere personal property. And in *Kittredge v. Woods*, 3 *N. Hamp. R.* 503, it was held that manure lying about a barn yard passed by a conveyance of the land as an incident.

These instances seem fully to justify the courts when they speak of the great difficulty in fixing on any certain criterion which shall govern all cases. They lead to a strain of reasoning

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by Mr. Dana, in the 3d vol. of his *Abridgment*, p. 156, as ~~well~~ by Weston, J. in *Farrer v. Stackpole*, by which, if followed ~~on~~ in practice, the machinery now in question might well be considered as a part of the realty ; and therefore, the subject of partition. Mr. Dana says, that in all the instances put by him, the articles " are very properly a part of the real estate and inheritance, and pass with it, because not the mere fixing or fastening to it is alone to be regarded ; but the use, nature and intention." Mr. Dana questions the decision in *Williams v. Bailey*, before cited, denying that the stove passed. 3 *Dana's Abr.* 157. See also *Amos & Fer. on Fixtures*, 154, 155. And Weston, J. says, 6 *Greenl.* 157, " Modern times have been fruitful of inventions and improvements, for the more secure and comfortable use of buildings, as well as of many other things which administer to the enjoyment of life. Venetian blinds, which admit the air and exclude the sun, whenever it is desirable so to do, are of modern use ; so are lightning rods, which have now become common in this country and in Europe. These might be removed from buildings without damage ; yet, as suited and adapted to the buildings upon which they are placed, and as incident thereto, they are doubtless part of the inheritance, and would pass by deed as appertaining to the realty. But the genius and enterprize of the last half century has been in nothing more remarkable than in the employment of some of the great agents of nature, by means of machinery, ~~to~~ an infinite variety of purposes, for the saving of human labor. Hence, there has arisen in our country a multitude of establishments for working in cotton, wool, wood, iron and marble ; some under the denomination of mills, and others of factories, propelled generally by water power, but sometimes by steam. These establishments have, in many instances, perhaps in most, acquired a general name, which is understood to embrace all their essential parts ; not only the building which shelters, encloses and secures the machinery, but the machinery itself. Much of it might be easily detached, without injury to the remaining parts, or the building, but it would be a very narrow construction, which should ex-



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clude it from passing by the general name by which the establishment is known, whether of mill or factory. The general principles of law must be applied to new kinds of property, as they spring into existence, in the progress of society, according to their nature and incidents, and the common sense of the community. The law will take notice of the mutations of language, and of the meaning of new terms, applied to new subjects as they arise. In other words, it will understand words used by parties in their contracts, whether executed or executory, whether in relation to real or personal estate, according to their ordinary meaning and acceptance." He then supposes the steam-saw-mill at Bath to be conveyed by its name of a *steam-saw-mill*, and adds, "If you exclude such parts of the machinery as may be detached without injury to the other parts, or to the building, you leave it mutilated and incomplete, and insufficient to perform its intended operations. The parties, in using the general term, would intend to embrace whatever was essential to it, according to its nature and design; and the law would doubtless so construe the conveyance as to effectuate the lawful intention of the parties." In aid of these views, undoubtedly, comes the reasoning of Lord Mansfield on the question between the heir and executor respecting the salt pans. *Lawton v. Salmon*, 1 H. Black, 259, n.; 3 Atk. 16, n. 1, S. C. "The present case is very strong. The salt spring is a valuable inheritance; but no profit arises from it unless there is a salt-work, which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessaries, necessary to the use and enjoyment of the principal. The owner erected them for the benefit of the inheritance. He could never mean to give them to the executor," &c. This case shows how the fire engines in *Lawton v. Lawton*, 3 Atk. 12, erected by the tenant for life, and there claimed by and allowed to his executor against the remainder-man, would have been decided, had the question been between the executor and heir, or vendor and vendee. The case of the cider mill fixed in the ground, which was awarded to the executor as against

the heir, turned upon a custom. 3 *Atk.* 14, n. 2. 1 *H. Bla* 260. Mr. Wilbraham, who argued for the executor and against the remainder-man; in 3 *Atk.* 14, and who succeeded, still gave his opinion, when the salt pan case came before Lord Mansfield, that it would have been different in respect to the heir; and Lord Mansfield expressly adopted his opinion. These salt pans were very slightly fixed with mortar to the floor, and might be removed without injuring the buildings. A steelyard hung in a machine house, was considered a fixture. *Rex. v. Inh. of St. Nicholas, Gloucester*, 262. It was fixed for weighing coal and other things brought to market. Lord Mansfield said it must be annexed to the freehold in the nature of the thing. "What is the house? It is the machine house. They are one entire thing, and are together rated by the common known name which comprehends both: and the principal purpose of the house is for weighing. The steelyard is the most valuable part of the house. The house, therefore, applied to this use, may be said to be built for the steelyard, and not the steelyard for the house." One question was whether the whole machine was rateable as real estate, the steelyard inclusive, for the support of the poor. Messrs. Amos & Ferard, speaking of this case, say, "the machine which had been rated was clearly affixed to the freehold; and the court seem to rely upon that circumstance in delivering their judgment." *Amos & Fer. on Fixt.* 209. They then advert to another case in *Caldecott*, 266. It is *Rex v. Hogg*. There the sessions rated a building by the name of "the engine house." The sessions stated, at first, that "the engine is not fixed to the premises, but capable of being moved at pleasure." The whole building and machine were assessed at £36, though the building, independent of the machine, was worth only two guineas. The court directed the case to be restated. They required the sessions to state whether the engine was worked "with water or horses; whether the house was a dwelling house, or built for the purpose of receiving the engine, and whether it was used for any other purpose; and in what manner the engine was put up in the engine house, and what its size and bulk." The counsel

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afterwards consented to a set of facts ; among them, they agreed that the engine was worked generally with water, but frequently by hand ; that the building was not a dwelling house, nor was it erected for the purpose of receiving the engine, but formerly was used for the purpose of turning bobbins, and as a weaver's shop ; but is now used for the purpose of carrying on the cotton manufactory, there being in the same building two other engines, one of which was used for the purpose of carding and the other for tumming cotton, which *tumming* is another process of the same manufactory. All the engines are placed on the *floor*, and *no ways annexed or fastened* to the same, but may be moved at pleasure, and carried out and worked in any other place, either by means of water or manual labor, and are not adapted to any particular building. The frame in which the engine stands is twelve feet in length, three feet eleven inches in breadth and two feet nine inches in height ; the semi-diameter of the largest cylinder, with a small roller at the top rising twenty inches above the frame, the engine sinking in the same, seventeen inches." Still the difficulty as to annexation remained ; for one question was, whether the machine was rateable except as a part of the real property. Caldecott, in support of the assessment, complained that the return was evasive in merely saying that the engine was not annexed or fastened to the *floor* ; whereas it might be fastened to the building in some other way. The opposing counsel said it was placed on the floor like a chair. Ashurst, J. said the case was still imperfect ; for it is not stated negatively, that this engine, while it is in a state of working, is not in some way or other fixed to the house. It is only stated that it is not fixed to the *floor* : but it may be fixed to the walls of the building without being fixed to the floor. We can assume no facts on either side ; but one should suppose *that it must be fastened in some way*, otherwise, as it is worked by water, the weight of the water must displace it ; and if so, it is exactly the case of *The King v. St. Nicholas, in Gloucester*. Buller, J. said, speaking of the right to the engine, as between executor and heir, or tenant and landlord, "If the engine were *clearly*

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*distinct*, it would, in all cases, go to the executor. But here all being under lease for a term, all would go to the executor." Grose, J. said, "This is an engine house fitted up with an engine, but whether that is fixed or not is uncertain. The engine is evidently a part of the house; for Walmesley is stated to be lessee of the premises, which comprehend the whole, both *house and engine*. I therefore consider this as an entire thing." Messrs. Amos & Ferard, in commenting upon this case, admit that it is generally considered as deciding that a poor rate may be assessed on mere personal property rented with a building. But they say, the better opinion seems to be that it cannot; and they seem to rely on what Ashurst, J. said, as showing that the engine was probably considered real estate.

The two last cited cases seem to allow that the slightest permanent annexation of machinery is sufficient to make it a part of the realty; and sustain the reasoning of Weston, J. in *Farrar v. Stackpole*, so far as it maintains that the chain was a fixture, because it was hooked for use as a part of the permanent machinery. He said "the chain is the last in the parts of the machinery, to which the impelling power is communicated, to effect the object in view. Its actual location in the succession of parts can make no difference." See also the remarks of *Amos and Ferrard on Fixtures*, p. 4, note (a) on the case of *Davis v. Jones*. A later case is somewhat material. *Colegrave v. Dias Santos*, 2 *Barn. & Cress.* 76, was decided in Tr. term, 1823, by the king's bench, 3 *Dowl. & Ryl.* 255, S. C. It arose between the vendor and vendee of a mansion house with the lands, called Downsell Hall, in Essex. A conveyance was executed and the defendant entered into possession. To the house belonged certain articles which were all taken possession of with it by the vendee, and none of them had been excepted either in the particulars of the sale, which was by auction, or the deed of conveyance. They consisted chiefly of "bells and bell pulls, stoves, grates, blinds, shelves, coppers, a water-butt, and other articles of the same kind," 3 *Dowl. & Ryl.* 255; or according to 2 *Barn. & Cress.* "Stoves, grates, kitchen ranges, closets, shelves,

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brewing coppers, cooling coppers, mash tubs, locks, bolts, blinds," &c. The plaintiff, the vendor, demanded them all of the defendant, the vendee, by the name of *fixtures*; and, on the latter refusing to deliver them, brought trover; which it was held would not lie for any of them. It was conceded that some of the articles might be moveables; in 2 *Barn. & Cress. Abbott*, C. J. said "three or four trifling articles;" what they were is not stated by either report; but the recovery was denied for the whole, in as much as there was a general demand and refusal of the whole as fixtures. Maryatt and Platt mentioned *stoves, bell pulls, shelves* and *water-butts*, as moveables, none of which were permanently attached to the house, or could be considered as part of it. Bayley, J. asked, "is that so clear? To whom would such articles pass, the heir or executor?" The counsel submitted they would pass to the executor. Best, J. asked, "Is not *Wynne v. Ingleby*, 1 *Dowl. & Ryl.* 247, a case of ranges, ovens and set-pots, taken by a *fi. fa.* against the owner of the freehold, see *S. C. Nom. Winn v. Ingilby*, 5 *Barn. & Ald.* 625, an express decision to the contrary? Has the vendor a right to dismantle a house in order to remove such articles?" For this colloquy, see 3 *Dowl. & Ryl.* 256. I can not learn from the books, that there has been much litigation concerning fixtures as between vendors and vendees of houses since the decision of *Colgrave v. Dias Santos*. The rule of that case has lately been held to prevail as between mortgagor and mortgagee. *Longstaff v. Meogoe*, 2 *Adolph. & Ellis*, 167. Yet the English cases are extremely difficult to reconcile, especially those which have arisen between heir and executor. See *Amos & Ferrard on Fixtures*, ch. iv. § 2. p. 151.

There is also considerable conflict in the American cases, as may be seen by those which I have cited. The inconsistency appears to have arisen occasionally from not attending to the distinction maintained by the older cases, between the two relations of vendor and vendee, and tenant and landlord; though sometimes it has also arisen from a difference as to the mode of annexation. In *Powell v. Monson & Brimfield Manufacturing*

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*Company*, 3 *Mason*, 459, both the New-York and Massachusetts cases were cited, to prove that the wheel and gearing of a cotton factory were not to be considered a part of the freehold, in such sense that the widow could have dower of them. *Story*, J. was driven to say that the carding machine in *Gale v. Ward*, though attached to the wheel by a leather band, was not strictly a fixture; and that the fastening in *Cresson v. Stout*, would not make the machinery so. Yet certainly the wheel, and most, if not all the gearing mentioned and described in 3 *Mason*, might have been as easily removed as many other things attached to the freehold, which have been treated as moveables. The case of the *Cotton gin*, in 1 *Bailey*, the English *Steelyard* and *Engine* cases cited from *Caldecott & Colgrave v. Dias Santos*, with several other English cases, show that a very slight affixing for permanent use is sufficient. The mere hooking of a chain in *Farrar v. Stackpole*, was sufficient under the circumstances. Why is the key of a door-lock deemed a fixture? Because it makes a part of the permanent machinery used to secure the door. Yet it is kept entirely separate, except when employed in locking and unlocking the door. The mode of annexation must evidently depend on the manner in which the parts of machinery are used. The saws in a saw mill may be in two sets, one at work, while the other is undergoing repairs or filing and sharpening; and either may be easily removed without violence to the frame where they belong; are either to be considered the less fixtures for these reasons? *Gibbons* says, if a copper fastened in brick-work have a moveable cover, the latter is a fixture; because the copper is the principal thing and the latter a mere appendage. *Gibbons on Fixtures*, 17. The case of *Davis v. Jones*, 2 *Barn. & Ald.* 165, has accordingly been thought unexplainable by the principles professedly adopted in the case itself. Certain jibs making part of an entire machine, which was clearly a fixture, were treated as mere personal property. See *Amos & Ferrard on Fixtures*, p. 4, note (a.)

The ancient distinction, however, between actual annexation and total disconnection is the most certain and practical; and

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should therefore be maintained, except where plain authority or usage has created exceptions. The reasoning of Mr. Dane, and of the learned judge in *Farrar v. Stackpole*, before cited, while it can not be too extensively applied to modern machinery in subordination to that distinction, does not appear to be sustained by authority, when it seeks to raise a general doctrine of constructive fixtures, from the moral adaptation of what is in fact a mere moveable, to the carrying on a farm or factory, &c. however essential the moveable may be for such purpose. The argument in that shape proves too much. Such adaptation and necessity might be extended even to the use of domestic animals on a farm, and certainly to many implements in a manufactory which could never be recognized as fixtures, without utterly confounding the rule by which the rights of the *heir* or the *purchaser* have been long governed. The judicial application of the rule is already sufficiently nice and difficult. As between heir and executor, it was partially altered by 2 R. S. 24, § 6, *sub. 4*, 2d ed. By this, "things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support," pass to the executor. And see 3 *id.* 638, 9, 2d ed. *Appendix*. This provision certainly indicates any thing but a legislative intent to enlarge the rights of freehold. Taken literally, it would strip the heir, of the wheels, gearing and all the other machinery fixed in the ordinary way to a mill or manufactory inherited by him. It is certainly contrary to the ancient common law; see 11 *Vin.* 167, *Executor (Z)* pl. 6; *Amos & Fer. on Fixt.* 133, and cases there cited on to p. 138; and seems to derive very questionable countenance from more modern authority. *Squire v. Mayer*, a short note of which is given in 2 *Freem.* 246, goes the farthest towards our statute rule; but how very doubtful this and some other modern causes of the like tendency are, may be seen by *Amos & Fer. on Fixt. ch. 4*, § 2, p. 151, and cases there cited. See also *Gibbons on Fixt.* 11, 12. As between devisee and executor, the suggestion of Vice Chancellor Hart in *Lushington v. Sewell*, 1 *Sim.* 435, 480, seems to go beyond any adjudged

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case in favor of the freehold. He inclined to think that the devise of a *West India estate* would pass the incidental stock of slaves, cattle and implements ; because such things are essential to render the estate productive ; and, denuded of them, it would be rather a burden than a benefit.

It is, I think obvious, not only from our statute, but from both the English and American cases, that there is a stronger tendency to consider fixtures for the purposes of trade as mere personal property, than we find either in regard to those of an agricultural or domestic character. See *Gibbons on Fixt.* 10, 11. *Amos & Fer. on Fixt* 138, ed of 1830. By several English cases cited in these treatises, the executor was in respect to trade fixtures preferred in his claim against the heir, though the doctrine is far from being settled. By several American cases, we have seen that such fixtures were denied to have passed even as between the vendor and vendee of the freehold ; though such a rule derives no countenance, or certainly very little from any English authority ; and seems to be against the weight of American adjudication.

On the whole, I collect from the cases cited, and others, that, as a general rule, in order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a plantation, farm or lot, &c., or in terms denoting a mill or factory, &c. nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it. It need not be constantly fastened. It need not be so fixed that detaching will disturb the earth or rend any part of the building. I am not prepared to deny that a machine moveable in itself, would become a fixture from being connected in its operations by bands, or in any other way, with the permanent machinery, though it might be detached, and restored to its ordinary place, as easily as the chain in *Farrar v. Stackpole*. I think it would be a fixture notwithstanding. But I am unable to discover, from the papers before us, that any of the machines in question before the



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commissions were even slightly connected with the freehold. For aught I can learn, they were all worked by horses or by hand, having no more respect to any particular part of the building, or its water wheel, than the ordinary moveable tools of such an establishment. These would have their common place, and be essential to its business. So a thrashing machine, and the other implements of the farmer. But it would be a solecism to call them fixtures, where they are not steadily, or commonly attached, even by bands or hooks, to any part of the realty. The word *fixtures* is derived from the things signified by it being fastened, or *fixed*. "It is a maxim of great antiquity, that whatever is *fixed* to the realty is thereby made a part of the realty, to which it adheres, and partakes of all its incidents and properties." *Toml. Law Dict. Fixtures*. Hence *fixtures* are defined to be "chattels or articles of a personal nature which have been affixed to the land." *Id.* "It is an ancient principle of law," says Weston, J. in *Farrar v. Stackpole*, "that certain things, which, in their nature, are personal property, when attached to the realty, become part of it as *fixtures*." And see *Amos & Fer. on Fixt. ch. 1, p. 1*.

It is not to be denied that there are strong *dicta*, and perhaps we may add the principle of several adjudicated exceptions, upon which we might, with great plausibility, declare the machines in question, so essential to the purposes of the manufactory, although entirely dissociated with the freehold, a fit subject for entering into the list of constructive fixtures. The general importance of the rule, however, which goes upon corporal annexation, is so great, that more evil will result from frittering it away by exceptions, than can arise from the hardship of adhering to it in particular cases.

Nor can we possibly say, as in the case of the steelyard or engine in the cotton manufactory, cited from *Caldecott*, that the machines in question must, in the nature of the thing, be annexed to the freehold. It appears, by the papers before us, that they have been used with the factory for several years, and have passed with it in conveyances. But the affidavits do not state that

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they are affixed in any way. They are treated by both parties, for aught I can see, as entirely detached, though the defendant ventures to express an opinion that some of them *constitute a part of the factory itself*. He gives no particulars, however, from which we can say they may make a part, any more than if they were so many chairs to sit on.

It is true, that this factory seems to have been pretty much dismantled, the principal part of its machinery has been treated as mere movables. Both the defendant and Mr. Smith, one of the commissioners, concur in stating that nothing about the factory was treated as a fixture, except the water-wheel, fulling-mill, dye-kettle, press, and tenter bars; and Mr. Smith says the factory was impelled by a valuable water power. The suspicion would, indeed, be quite strong, from such facts standing alone, that at least, some of the important and valuable machinery excepted, might be brought within the legal notion of fixtures; and yet the defendant himself has not ventured to state, as I can find, that any part of the particular machinery excepted from the report, was in the least dependent for its operation on the water-wheel or other permanent parts of the factory; while Mr. Goodrich, one of the commissioners, says in his affidavit, that the excepted machinery was not *affixed* to the *building* or *land*. There the case is left; not one of the deponents pointing out any connection whatever. No authority cited on the argument, nor any that I have seen, goes so far as to say that mere loose and moveable machines totally disconnected with, and making no part of the permanent machinery of a factory, can be considered a fixture even as between vendor and vendee. We think the motion must be denied with costs, and the report of the commissioners is confirmed.

9 March 26, 1839.

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The People v. The Judges of Dutchess C. P.

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THE PEOPLE, *ex relatione* Doughty, vs. THE JUDGES OF  
DUTCHESS C. P.

A *mandamus* will not lie to a subordinate court for the correction of *judicial errors*; all this court can do in the exercise of its supervisory power is to require inferior tribunals *to proceed to judgment*, but cannot dictate the judgment to be rendered; much less can such tribunals be required to retrace their steps and reverse a decision already made. So held in a case where a court of C. P. had manifestly erred in quashing an appeal.

In respect to *ministerial officers* and *corporations* it is otherwise; they may be required by *mandamus* to act in a particular manner, and even to reverse what they have already done.

MANDAMUS. By the return to the alternative writ, it appeared that *James Griffin* recovered a judgment against the relator before a justice of the peace, on the *twelfth* day of March, 1839, from which the relator had attempted an appeal to the C. P. When the cause came on for trial in the C. P., Griffin objected that the court had no jurisdiction, and on referring to the affidavit and appeal bond it appeared those papers recited a judgment as rendered by the justice on the *eleventh* day of March, 1839, whereas the return of the justice was of a judgment rendered on the *twelfth* day of that month. In all other respects the affidavit and bond described the judgment accurately, and were in due form. The relator thereupon offered to prove that only one cause had been tried before the justice between the parties, and also offered to amend the bond. But the court refused to allow the amendment, "for the reason that the bond was neither informal nor imperfect, but was a bond to remove a different judgment from the one returned by the justice, and also for the reason that the affidavit upon which the appeal was allowed also mentioned a judgment different from the judgment returned by the justice, and which affidavit the C. P. could not amend." Whereupon the court refused to proceed to the trial of the cause, and although no notice had been given by Griffin of a motion for that purpose, quashed the appeal. The alternative writ required the judges of

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the C. P. to vacate the rule quashing the appeal, and to deny the motion made by Griffin to quash the appeal, or show cause, &c.

*C. W. Swift*, for the relator, now moved for a peremptory mandamus.

*S. Barculo* opposed the motion.

*By the Court*, BRONSON, J. Although the bond was perfect in point of form, there was a variance of a day in reciting the judgment. The recital of the day on which the judgment was rendered was wholly unnecessary, 2 R. S. 259, § 189, and the variance was, I think, such an "imperfection" as the court might, in its discretion, have allowed to be amended. § 204. There is also another statute fully warranting the amendment, 2 R. S. 556, § 33, 34, and the court of common pleas erred in ordering the appeal to be quashed.

This presents an important question in relation to the appropriate office of the writ of mandamus. The court of common pleas, acting within the scope of its jurisdiction, has heard and decided a matter properly brought before it for adjudication, and the question is, whether we can, by mandamus, require that court to undo what it has done, on the ground that the decision was erroneous. I am of opinion that we possess no such power. I shall not stop to enquire whether the order quashing the appeal was such a final judgment upon the rights of the parties as may be reviewed by writ of error, nor whether the relator has any other remedy. *Commonwealth v. The Judges of the C. P.* 3 Bin. 273. I place my opinion upon the broad ground that the writ of mandamus cannot be awarded for the correction of judicial errors. This court, in the exercise of its supervisory power over inferior tribunals, can require them, by mandamus, to proceed to judgment, but we cannot dictate what particular judgment they shall render; much less can we require them to retrace their steps, and reverse a decision already made. Although ministerial officers and corporations may be required by this writ to act in a particular manner, or even to reverse what they have

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already done, the rule is otherwise in relation to courts of justice, and other bodies acting judicially, upon matters within their cognizance. Their errors, if corrected at all, must be reached by some other process than the writ of mandamus.

It is not to be denied that there had been a gradual departure in this state from the old law on this subject, until this court had, in one instance at least, exercised a jurisdiction by mandamus as large as that which we now decline. But we stand corrected by the decision of the court of last resort in the case of *The Judges of Oneida v. The People*, 18 *Wendell*, 79. As we understand that decision, taken in connection with the resolution adopted by the court, we have no jurisdiction by mandamus to review the decision of a subordinate court in a matter of which it had judicial cognizance.

Of this doctrine we do not complain. On the contrary, I will mention by way of confirmation a few authorities in addition to those cited by Mr. Senator *Tracy* in his opinion. In *Chase v. The Blackstone Canal Co.*, 10 *Pick.* 244, the court refused to issue a mandamus to an inferior tribunal which *had acted* in a judicial capacity upon a question properly before it. They said, the writ lies either to compel the performance of *ministerial* acts, or is addressed to subordinate *judicial* tribunals, requiring them to *exercise* their functions and render *some* judgment in cases before them, when otherwise there would be a failure of justice from a *delay or refusal to act*. But when the act to be done is *judicial* or discretionary, this court will not direct *what decision* shall be made. And they referred with approbation to the case of *The U. S. v. Lawrence*, 3 *Dall.* 42, where it was held by the supreme court of the U. S. that they could not interpose by mandamus to compel a district judge to decide according to the dictates of any judgment but his own. In the case of *Strong, petitioner, &c.*, 20 *Pick.* 484, *Morton, J.* said, this high judicial writ not only lies to ministerial, but to judicial officers. In the former case, it contains a mandate to do a *specific act*, but in the latter, only to *adjudicate—to exercise a discretion* upon a particular subject. In *Ex parte Hoyt*, 13 *Peters*, 279, the district court

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had made an order in relation to the custody of certain goods which had been seized by the collector, and the supreme court refused a mandamus to compel the district court to vacate its order. Mr. Justice Story, who delivered the opinion, said, the application was not warranted by the principles and usages of law—that it was neither more nor less than an application for an order to reverse the solemn judgment of the district judge in a matter clearly within the jurisdiction of the court, and to substitute another order in its stead. He added, it has been repeatedly declared by this court that it will not, by mandamus, direct a judge *what* judgment to enter in a suit, but will only require him to *proceed* to render judgment. The same learned court made a similar decision in *Ex parte Whitney*, 13 *Peters*, 404. They said, a writ of mandamus is not the appropriate remedy for any orders, which may be made in a cause by a judge in the exercise of his authority, although they may seem to bear harshly or oppressively upon the party.

The case of *The King v. The Justices of Monmouthshire*, 7 *Dowl. & Ry.* 334, is much like the one at bar. The court of sessions had quashed an appeal, and a motion for a mandamus was denied by the king's bench. *Abbott*, C. J. said, "where the sessions *forbear to give any judgment at all*, this court will interpose to compel them to *go on* and pronounce judgment; but where they have *actually given judgment*, even under a mistake of law, this court has never yet interposed to disturb their decision." He added, "if we were to grant this application, we should be opening a door to continued litigation and enormous expense, in every case where the propriety of the decision of the sessions might be questioned, either on the ground of mistake in law or fact. There seems to be no authority for such a proceeding, and as our predecessors have not recognized its propriety, we are certainly not disposed to take a step which is so pregnant with mischievous consequences." And *Bayley*, J. said, "the sessions having decided the case, and quashed the order, we are not at liberty to consider whether they have done right or wrong." In *Rex v. Justices of Wilts*, 2 *Chitty's R.* 257,

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there was a motion for a mandamus to dismiss an appeal, on the ground that the sessions had decided wrongly ; but the application was refused ; and when the court was pressed with the argument that the party had no other remedy, it was answered by *Bayley, J.*, that "there are many cases in which there is no other remedy against the sessions, where we should not interfere." *The King v. The Justices of Cambridgeshire*, 1 D. & R. 325, proceeded on the same principle. In *Squier v. Gale*, 1 Halst. 156, the supreme court of N. J. held, that a mandamus would lie to an inferior court to command them to proceed to judgment, but not to command them to proceed to any particular judgment. *Roberts v. Holsworth*, 5 Halst. 57 ; *Hawkins v. Bennett*, 7 Halst. 179, and *The County Court of Warren v. Daniel*, 2 Bibb. (Ky.) 573, are to the same effect.

Many other cases might be mentioned in support of this doctrine, but with the addition of those referred to by Mr. Senator Tracy, enough have already been cited, to show, that neither the king's bench in England, nor those courts in this country, which exercise a like supervisory jurisdiction over subordinate tribunals, would feel themselves authorized to award a mandamus to compel an inferior court to render any particular judgment, or to reverse a decision or order already made in a case properly before it. If this court has occasionally made a more liberal use of the writ of mandamus, it has generally been in cases where the power to proceed in that form has not been questioned, or where the objection has not been much relied on by counsel ; and it has probably happened to all courts, that, with their attention principally directed to the question of right between the parties, they have sometimes failed to give sufficient consideration to the form of the proposed remedy.

In general, a mandamus will not be awarded where the party has another legal remedy ; but the converse of the proposition does not hold true. There are many cases where, although the party has no other remedy, a mandamus will not lie. Motions for new trials on the weight of evidence, on the ground of surprise, or to let in newly discovered evidence, and applications

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The People *v.* Superior Court of New-York.

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for amendments, for relief against defaults, and the like, are among the number. Such questions are addressed to the sound discretion of the court of original jurisdiction, and their decision is final. However desirable it may seem in a particular case to reach the decision upon such a matter, I am well satisfied that the advantages which would probably result from the review, whether by *mandamus* or otherwise, would be greatly outweighed by the mischiefs which would be likely to follow. There are few decisions which conclude the party as to his legal rights, which cannot be reached by writ of error. If we had the power to go beyond cases of that kind, and should undertake to re-examine matters of practice and questions of discretion, it would be necessary to multiply appellate courts to an indefinite extent—legal controversies would be interminable, and the parties would be overwhelmed with costs and expenses.

But it is enough that this court does not possess the power to review judicial errors of any kind by *mandamus*. We are all of opinion that the motion for a peremptory writ must be denied.

Motion denied.

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THE PEOPLE, *ex relatione* Werckmeister, *vs.* THE JUSTICES OF  
THE SUPERIOR COURT OF THE CITY OF NEW-YORK.

On the denial of a motion in a subordinate court to set aside a report of referees, the party conceiving himself aggrieved is entitled to a review by writ of error of all questions of *law* involved in the decision, but not of questions of *fact*; as to the latter the decision of the court of original jurisdiction is as final and conclusive as it is on a motion to set aside the verdict of a jury as against evidence.

This court has power by *mandamus* to require a subordinate court to settle a case after the denial of a motion to set aside the report of referees, so as to enable the party to bring error; but not to direct what facts shall be inserted in the case.

**MANDAMUS.** Abraham Ackerman and another brought an action of *assumpsit* against the relator in the superior court of New-York, in which there was a report of referees in favor of the plaintiffs, which the court, on motion, refused to set aside, and rendered judgment for the plaintiffs. The relator sued out



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a writ of error, and the court below settled a state of facts to be inserted in the record, with a view to the questions of law, which the relator desired to review on error. He now insists that the court in settling the case, has not drawn the proper conclusions of fact from the evidence which appeared before the referees, and moves for a mandamus to the judges of the court below, requiring them to correct the case in several particulars, which it is not material to specify.

*S. Stevens*, for the relator.

*J. L. Wendell*, contra.

*By the Court*, BRONSON, J. When a motion is made to set aside a report of referees, the evidence upon which they decided is very commonly set out at large for the consideration of the court in which the action is pending. On a review of that evidence, if the case involves the necessity of reviewing it, the court first determines what conclusions of fact the referees were warranted in drawing from the evidence, and then disposes of any questions of law which may arise out of the facts thus ascertained. The court examines the evidence in such cases, upon the same principle that it examines the evidence given to a jury, where a motion is made to set aside a verdict. If the motion to set aside the report is denied, the party who thinks himself aggrieved, may, according to the modern practice, have a review by writ of error as to all questions of law involved in the decision, but not as to questions of fact. The decision of the court of original jurisdiction upon questions of fact, is just as final and conclusive, where a motion is made to set aside a report of referees, as it is on a motion to set aside the verdict of a jury. It cannot be reviewed in another forum. On a writ of error, the court can only examine questions of law.

When a re-hearing has been denied, if the party wishes to bring error, a case, or statement of the facts, must be prepared and inserted in the judgment record. The case is drawn up and settled under the direction of the court in which the action is pending. In relation to objections taken before the referees to

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the admission or rejection of evidence, it is in the nature of a bill of exceptions; but in relation to disputed facts, it is in the nature of a special verdict. The case should not contain *the evidence* given before the referees, but only *the conclusions of fact* which the court has drawn from that evidence. *Reed v. Rensselaer Glass Factory*, 3 Cowen, 387. *Feeter v. Heath*, 11 Wendell, 477. *Melvin v. Leaycraft*, 17 Wendell, 169. For the purpose of giving a review, the court is obliged to put itself in the place of a jury, and say what conclusions of fact the referees were warranted in drawing from the evidence. Those conclusions are in the nature of a special verdict, which must find, not the evidence of facts, but the facts themselves. When a case is thus settled and inserted in the record, the questions of law arising out of it may be reviewed by writ of error.

If we cannot directly, by writ of error, review a decision upon questions of fact, it follows, I think, that we cannot do the same thing indirectly, by requiring the court below to insert any particular state of facts in the record. We may, perhaps, require a subordinate court to settle a case on the principles I have mentioned; but we cannot undertake to control the court as to what facts in particular the case shall contain. By doing so, we should assert the right, and that too by mandamus, of reviewing the decision of a subordinate court upon mere questions of fact. That is a jurisdiction which we do not possess.

It is said that the case may be improperly settled, and that the parties should have some means of correcting it. But if we should undertake to settle the case, the same remark would apply with equal force. We too may fall into error. The answer to the argument is, that this is one of the many questions upon which the decision of the court of original jurisdiction is final, and cannot be reviewed in any form. When the judges of that court have exercised their judgment and discretion in the settlement of a case, there is an end of the question.

In the case at bar, the state of facts was in the first instance drawn up under the direction of the chief justice of the superior court. The case was then re-examined and amended on argu-

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ment before all the judges. Whether we should have settled the facts as they now appear if the action had been brought originally in this court, is a question which we are not called upon to decide. We are all of opinion that a mandamus cannot be awarded.

Motion denied.

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### HINMAN and others vs. BOOTH.

Where in a *joint action* of ejectment by *five plaintiffs*, who claim the *whole* of the premises in question, *three* succeed and recover judgment for one fourth of the premises, and *two* fail in maintaining their action, the parties succeeding are entitled to a full bill of costs, deducting such charges as exclusively relate to the two plaintiffs who have been defeated.

So on the other hand, the defendant is entitled to a full bill of costs against the failing plaintiffs, deducting such portions of the costs of the defence as relate exclusively to the prevailing plaintiffs.

The two failing plaintiffs are *jointly* liable for the whole costs which the defendant is entitled to recover, although one abandons the prosecution sooner than the other.

CROSS-MOTIONS for retaxation of costs, in ejectment. On the trial the jury found a verdict for the plaintiffs, Guy, George T. and Mary *Hinman*, for an undivided *quarter* of the premises, for the plaintiff *Catlin* for an undivided *half* of the premises, and as to the plaintiff *Beardslee*, who claimed the remaining *quarter*, the jury found a verdict for the defendant. The defendant made a case for the purpose of setting aside the verdict both as to the *Hinmans* and *Catlin*. On argument of the case, the court held that the *Hinmans* had made a good title to one quarter, but that the verdict in favor of the plaintiff *Catlin* was wrong, and they ordered a new trial, costs to abide the event, unless the plaintiffs should consent to amend the verdict so that it would stand in favor of the *Hinmans* for one quarter of the premises, and as to the residue for the defendant. The plaintiffs elected so to amend the verdict. Each party taxed costs against the other, and each appealed from the taxation.

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*A. Taber*, for the plaintiffs.

*M. T. Reynolds*, for the defendant.

*By the Court, BRONSON, J.* The Hinmans are entitled to judgment against the defendant on the verdict in their favor, and will recover costs as a matter of course. Their right has been contested throughout, and there is no practical rule, consistent with the statute, but to allow them such costs as they would have recovered if they had sued alone, without joining with the two plaintiffs who failed in the action. All charges which relate exclusively to the claim of the two plaintiffs who have been defeated must be rejected. If, for example, the declaration contained separate counts upon their title, charges for those counts, whether in the declaration, circuit roll or judgment record, must not be taxed against the defendant; and if witnesses attended or other expenses were incurred with exclusive reference to their claim, those expenses must be rejected. In other respects the plaintiffs who succeeded are entitled to a full bill of costs against the defendant.

The defendant is entitled to judgment against the plaintiffs, Catlin and Beardslee, in pursuance of the verdict, with costs. *Maybury v. Evans*, 19 *Wendell*, 625. The costs should, I think, be taxed on the same principle, substantially, as that already mentioned. The defendant is entitled to such costs as he would have recovered if the two plaintiffs who failed had sued alone. If any expenses were incurred in defending against the Hinmans exclusively, those expenses should not be allowed. In other respects the defendant is entitled to a full bill. We are not at liberty to say he shall recover less. 2 *R. S.* 615, § 16. *Canfield v. Gaylord*, 12 *Wendell*, 236. There will, however, be but one judgment record, and if that is made up by the plaintiffs who prevailed, the defendant will not be entitled to charge any thing on that account.

Although the defendant failed in his motion for a new trial so far as the Hinmans are concerned, he prevailed in relation to the

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plaintiff Catlin, and is consequently entitled to charge for making the case and the subsequent proceedings upon it.

It was insisted, that as the verdict passed against the plaintiff Beardslee, at the circuit, and he proceeded no further with his claim, he should not be subjected to the costs of the motion for a new trial. But he must, I think, abide the fate of the plaintiff Catlin. The defendant is not entitled to several judgments against Beardslee and Catlin, but to one judgment against both, on which there will of course be but one taxation of costs. They both united in the assertion of claims to the property which proved not to be well founded, and they must settle between themselves the portion of the taxed bill which each ought to pay. There must be a retaxation upon the principles I have mentioned.

Ordered accordingly.

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FLOWER'S EXECUTORS vs. GARR.

In an action of *assumpsit* for money had and received, brought by executors counting upon promises to the testator, an amendment was allowed after a report of referees, by permitting the plaintiffs to allege the promises to have been made to them as executors: it appearing on the hearing, that the moneys were received by the defendant subsequent to the death of the testator, though upon a retainer anterior to that time.

The only costs allowed the defendant, were those of preparing to set aside the report, and of opposing the motion.

It was held no objection to the motion that the cause was brought into this court by *certiorari* from a court of common pleas; the same power being exercised in such cases over the pleadings, which is exercised in suits brought here originally.

THIS action was commenced in 1824, in the New-York, C. P., and after declaration was removed into this court by *certiorari*. The action was brought to recover moneys which, as was alleged, the defendant had collected for the testator in the Havana. The declaration contained counts upon promises to the testator only.

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The cause having been referred, was heard by the referees in September and October last, and a report was made for the plaintiffs for \$1,200.36. On the hearing it appeared that the money had been received by the defendant *after the death of the testator*, though the original retainer was anterior to that time. In his summing up, after the evidence had been closed, the defendant for the first time objected, that the proofs did not support the declaration, which contained no count upon promises to the executors as such; and this objection being overruled by the referees, the defendant prepared papers for a motion to set aside their report.

*S. Stevens*, for the plaintiffs, now moved to amend the declaration by adding counts upon promises to the executors as such.

*J. L. Wendell*, contra.

*By the court*, BRONSON, J. This money belonged to the testator, but was received by the defendant after his death, by virtue of a previous retainer as his attorney. Whether in suing for it the plaintiffs name themselves as executors or not, the money, when collected, will be assets in their hands for the payment of the testator's debts. *Shipman v. Thompson*, *Willes' R.* 103. The executors, not knowing at what precise time the money was received by the defendant, have counted upon promises to the testator. But it turns out that the money came to the defendant's hands after the testator's death; and thus we have a variance between the pleadings and proofs, which the plaintiffs wish to get rid of by amending their declaration and adding counts upon promises to themselves as executors. It is not a new cause of action which the plaintiffs wish to set up, but a proper description of the cause of action which has been litigated between the parties. It is in this respect like the case of *Miller v. Watson*, 6 *Wendell*, 506, where the plaintiff was allowed to add a count on the special agreement between the parties, after the same matter had been tried upon the common counts. It is like that case

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in another respect, for here the statute of limitations will have run if the plaintiffs are turned round to a new action. In *The Executors of Marlborough v. Widmore*, 2 Str. 890, the plaintiffs counted on a promise to their testator, and after issue joined on a plea of the statute of limitations, were allowed to amend by laying the promise to have been made to themselves.

I have already said, that this is merely a question of variance, and as such it cannot be distinguished from a great number of cases where we have allowed amendments after verdict for the purpose of obviating an objection taken on the trial. There is no pretence in the papers that the defendant has been misled. He fully understood the object of the action, and the cause has been litigated throughout without any reference to the form of the pleadings. It is not stated that the defendant ever thought of the objection himself until after the proofs had been closed. He has made his defence as fully as he could ever hope to make it if a new trial were granted. Under such circumstances, amendments have often been allowed after verdict, and for the purpose of upholding it. 18 *Johns. R.* 510. 2 *Cowen*, 515. 4 *Cowen*, 124. 7 *Cowen*, 483, 518. And of late, it has become almost a matter of course to grant such amendments, whether before or after trial, as the ends of substantial justice may require.

It is no objection to the motion that the cause came here from the common pleas by *certiorari*. Our power over the pleadings is as ample as it would be had the suit been originally brought in this court.

It is very difficult to lay down any general rule as to the terms upon which such amendments should be allowed. In this case, the defendant insists that he should have costs of the action since the time of declaring. But we think otherwise, and that he ought only to have costs since the objection for variance was taken. The plaintiffs may amend on payment of the costs of opposing this motion, and the costs of the defendant in preparing to set aside the report of the referees, and the subsequent proceedings thereon.

Ordered accordingly.

## MCPHERSON &amp; CRANE vs. MELHINCH.

In *replevin*, where the defendant justified the taking as a distress for rent in arrear in the form of a *plea in bar*, concluding with a prayer of judgment and for a return of the goods, the plea differing from a *cognizance* only in its commencement; and the defendant treated the plea as a *cognizance* and put in *three pleas* in answer thereto, and the defendant moved to strike out the pleas of the plaintiff on the ground that but *one answer* could be put in to such a plea, and that by way of *replication*—the motion was denied, the court holding that the defendant having committed the first fault, had no right to complain.

Whether a justification pleaded in the above form, instead of by *avowry* or *cognizance*, would be bad on demurrer, *quere*.

REPLEVIN. The declaration contained two counts. The defendant pleaded to both counts, 1, noncepit, and 2, property in a stranger; and then, as to each count, he made *cognizance* as bailiff of E. A. Wetmore, and acknowledged the taking as a distress for rent in arrear, in the usual form. He then pleaded the same matter—a distress for rent in arrear—several times over to each count, in the form of *pleas in bar*, concluding with a prayer of judgment, and for a return of the goods. These pleadings differ from a *cognizance* only in their commencement, which is in the form of a plea in bar, instead of the usual form of a *cognizance*. The plaintiffs treated these pleadings as *cognizances* and put in three pleas in bar to *each* of them, which the defendant now moves to strike out, on the ground that his pleadings were *pleas in bar* and not *cognizances*, and consequently that the plaintiffs could only have one replication to each.

E. A. Graham, for defendant.

J. Edwards, for plaintiffs.

By the Court, BRONSON, J. In *replevin*, the plaintiff can only have one replication to a plea in bar by the defendant, but to an *avowry* or *cognizance* he may plead as many several matters as he shall deem necessary for his defence. *Calvin v. La Farge*, 6 Wendell, 505. 2 R. S. 529, § 45. In the pleadings in question,



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the defendant, as the bailiff of Wetmore, justifies the taking of the goods as a distress for rent ; but instead of pursuing the usual form of a cognizance, he has, in the introductory clause, followed the usual form of a plea in bar, and by this departure from the precedents seeks to deprive the plaintiffs of more than one answer to each justification. The experiment cannot succeed. The defendant may plead several matters in bar of the action, as *non cepit*, *property* in himself or a stranger, *cepit in alio loco*, or a *release* ; but when he justifies the taking as a distress, and seeks a return, the proper form of pleading is an *avowry*, if the taking was in his own right, or a *cognizance*, if the taking was in right of another. The avowry or cognizance is in the nature of a declaration, and the plaintiff, like the defendant in other personal actions, may have several pleas in bar. Whether these justifications would have been set aside on motion, or whether the plaintiffs could safely have demurred to them for want of form, it is not very material to inquire. The defendant committed the first fault, and he has little reason to complain that the plaintiffs treated and answered his pleadings as though they had been in the usual and proper form. The plaintiffs have, however, made a mistake in referring to the different cognizances to the second count. Instead of calling them respectively the 1st, 2d, and 3d cognizance to the second count, they are mentioned as the 4th, 5th, and 6th cognizances to the second count, when there are but three to each count. The best mode of setting the parties right, will be to allow the defendant to plead anew, and when his pleadings are put in proper form, the plaintiffs may take the usual time to answer.

Ordered accordingly.

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Benham v. Lumberman's Bank.

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## WHALING vs. SHALES.

In *replevin*, the bond to the sheriff must be executed by *two sureties*. Where there is but *one surety*, the defendant may move to set aside the proceedings, and is not bound to *except*. The plaintiff, however, on payment of costs, will be allowed to amend, by filing a new bond with sureties, and the sureties justifying.

*M. T. Reynolds*, for the defendant moved to set aside proceedings in *replevin*, on the ground that there was only one surety in the bond to the sheriff. 2 R. S. 523, § 7.

*R. W. Peckham*, for the plaintiff, insisted that the remedy was by *exception*, not by motion. 18 *Wendell*, 521, and *note*.

By the Court, BRONSON, J. The proceedings are *irregular* where there is only one surety : see 18 *Wendell*, 581, and 19 *id.* 632 ; and it is going quite far enough to save the action, by allowing an amendment on payment of costs of the motion. The proceedings must be set aside, unless the plaintiff executes a sufficient bond *nunc pro tunc*, and the sureties justify.

Ordered accordingly.

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BENHAM vs. THE LUMBERMAN'S BANK at Warren.

In an action commenced by *attachment* against a *foreign corporation*, for the recovery of bills or bank notes issued by it, the plaintiff in his bill of costs is entitled to charge for *copies* of the bills or notes produced to the officer issuing the attachment ; also for *copies* of the same *filed* with the declaration, where that contains only the money counts ; also for copies of the same inserted in the *judgment record*, where the judgment is by assessment *after a default for not pleading*. The plaintiff is *not* entitled to charge for *copies* of the notes or bills *voluntarily served* with the declaration ; nor for *copies* of the same inserted in the *circuit roll* where there is a defence, or in the *judgment roll*, where there is a *verdict*.

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It seems that it is necessary to insert copies of the bills or notes in the circuit roll only where the plaintiff includes several different parties, as drawer or maker and endorser, in the same action.

*S. Stevens*, for the defendants, moved for a re-taxation of costs.

*A. Taber*, contra.

*By the Court*, BRONSON, J. The action was commenced by attachment against a foreign corporation and copies of the bills or bank notes on which the suit was brought, were necessarily produced to the officer on issuing the attachment. 2 R. S. 460, § 18. The charge of \$18.25 for those copies was properly allowed. The like charge for copies of the notes filed with the declaration was also proper. That was the only way in which the plaintiff could have his damages assessed by the clerk on a judgment by default, as the declaration only contained the money counts. *Statutes, Sess. of 1832, p. 490, § 10. 19 Wendell, 113.*

The charge of \$18.25, for copies of the notes to serve with the declaration, was improperly taxed. Those copies were not necessary. 19 *Wendell*, 113. Where a bill of particulars is furnished voluntarily, without a call from the other party, it cannot be taxed. 18 *Wendell*, 648. The like charge for copies of the notes inserted in the judgment record was improperly allowed. If there had been an assessment of damages by the clerk on a default, it would have been proper to insert copies of the notes in the judgment record, for the purpose of showing the regularity of the proceedings. But the defendants pleaded, and judgment was entered on the verdict of a jury. Copies of the notes in the judgment roll were wholly unnecessary.

It is only necessary to insert copies of the bills or notes in the circuit roll, where the plaintiff includes several different parties, as drawer or maker and endorser, in the same action, under the act of 1832, as amended, *Statutes Sess. of 1837, p. 72*. As this was not a case of that kind there was no necessity for inserting copies of the notes in the circuit roll. But on looking

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into the bill of costs, I find no charge whatever for the circuit roll. That was probably included in another bill which is not before me.

The two charges for copies to serve, and those inserted in the judgment record, amounting to \$36.50, must be stricken out.

Ordered accordingly.

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THOMAS vs. CURTIS.

Where a defendant in *actual custody* upon a *capias ad respondendum*, employs an attorney to defend the action, service of the declaration upon the attorney is good service, and it is necessary that a copy should be delivered to the defendant in person, or to the sheriff or keeper of the jail.

Nor is the defendant entitled to be discharged from imprisonment, if the declaration in such case be delivered to the attorney *absolutely*.

THE defendant was arrested previous to the last *July* term on a *capias* on which bail was required, and committed to prison for the want of bail. He employed an attorney to defend the action, who gave notice of retainer to the plaintiff's attorney. In *October* term the defendant's attorney was served with a copy of the declaration, but no copy was delivered to the defendant in person, or to the sheriff or keeper of the jail and on that ground,

*J. Williams*, now moved that the defendant be discharged from his imprisonment, and for judgment of discontinuance. He cited 2 *R. S.* 350, § 22, 23. He also insisted that by delivering the declaration absolutely, instead of endorsing it *de bene esse*, the plaintiff had waived bail.

*H. H. Martin*, contra.

*By the Court*, BRONSON, J. Service upon the attorney was, in legal effect, service upon the defendant. In *Judson v. Jones*, 12 *Wendell*, 209, the declaration was not delivered to any one, until after the defendant was entitled to his discharge. In *Gronehouse v. Cleaver*, 11 *Wendell*, 357, and 1 *Str.* 476, the prisoner

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had no attorney. In *Dent v. Hallifax*, 1 Taunt. 493, the attorney was only employed for the purpose of putting in bail, and when the declaration was served on him, he immediately returned it to the plaintiff's attorney, and pointed out to him the necessity of delivering it to the prisoner. But here, the attorney was employed generally, to defend the suit, and service upon him was sufficient.

When the defendant in a bailable action is at large, the plaintiff is not obliged to declare until after an appearance has been perfected, and if in the mean time he delivers a declaration *unconditionally*, it is a waiver of bail. But here, the plaintiff was obliged to declare "before the end of the term next after the process was returnable." 2 R. S. 350, § 23. And besides, there was nothing to be waived. The defendant was in actual custody, which was an appearance for all the purposes of the action. Although the defendant might put in and justify bail for the purpose of obtaining his discharge, the plaintiff could not call on him to do so. Having no right to demand bail, the delivery of a declaration unconditionally could be no waiver of bail.

Motion denied.

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THE CITY OF BUFFALO vs. SCRANTON and others.

Where a defendant, after a demurrer, serves an *amended plea* as of course, the plaintiff is not bound to accept it unless it is accompanied with an affidavit as required by the 23d rule of this court; if, however, the plaintiff's attorney does not return the plea, or in some other way apprise the defendant that it will not be regarded as sufficient, he waives the objection, and the subsequent entry of the defendant's default for not joining in demurrer will be *irregular*.

Although proceedings are set aside as irregular, no costs will be allowed to the prevailing party, if his papers are stuffed with unnecessary voluminous matter.

MOTION by defendants to set aside default for not joining in demurrer, and subsequent proceedings. The defendants pleaded several special pleas, to which the plaintiffs demurred. The defendants thereupon served amended pleas without an affidavit by

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the attorney, as required by the 23d Rule. Both attorneys resided in Buffalo. The plaintiffs' attorney kept the pleas over 20 days, and then entered the defendant's default for not joining in demurrer.

*D. Burwell*, for the motion.

*M. T. Reynolds*, contra.

*By the Court*, BRONSON, J. The plaintiff's attorney was not bound to accept the amended pleas without the affidavit required by the 23d rule. But he waived that objection by retaining the pleas. They should have been returned, or the defendants should in some other way have been informed that the pleas would not be regarded as sufficient without the necessary affidavit. The motion must be granted, but without costs, for the reason that the defendant's papers are unnecessarily stuffed with the pleadings in the cause.

Motion granted.

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 NORTH and another vs. PEPPER.
 

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Where, on demurrer to a declaration, judgment is rendered for the plaintiff, *with leave to the defendant to amend* on payment of costs, the plaintiff will not be permitted to enter judgment as of a previous term *nunc pro tunc*, although it be shown that the defendant died during the term in which the cause was submitted; the suit is abated, and the plaintiff must seek his remedy against the personal representatives of the defendant. It is only where the judgment is *final*, that it is allowed to be entered as of a term when the party was living.

DEATH of parties. The defendant demurred to the declaration, and the plaintiffs joined in demurrer in 1838. In July term, 1839, the cause was submitted to the court for decision, and in October term following, judgment was rendered for the plaintiffs on the demurrer, *with leave to the defendant to amend on payment of costs*. In July term, but whether before or after the cause was submitted for decision is left uncertain by the affidavits, the defendant died.

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*A. Taber*, for the plaintiffs, now moves for leave to enter the judgment as for the first day of July term, when the defendant was alive, *nunc pro tunc*.

*I. Williams*, contra.

*By the Court*, BRANSON, J. The affidavits leave it doubtful whether the defendant died *after* the cause was submitted for decision. But independent of that consideration, I think the rule laid down in *Spalding v. Congdon*, 18 Wendell, 543, should not be applied to a case like this. It should be confined to cases where the judgment is *final*, as where a verdict has been rendered or a nonsuit ordered, which is confirmed by the court on a motion for a new trial; or where judgment is rendered on a special verdict, demurrer to evidence, or a writ of error. In such cases, if a party die while the cause is *sub judice*, the judgment may be entered as of a time anterior to his death. But, according to the present practice, judgment on demurrer is seldom final. The party usually has leave, as the defendant had in this case, to amend on terms. A party very often demurs where he has a good answer on the merits to the pleading which he deems objectionable, and if the demurrer is not frivolous, it is almost a matter of course to allow the party, whether plaintiff or defendant, to withdraw the demurrer and plead. In cases where we do not hold the judgment final if the party were alive, it would be extremely harsh to give it that operation in the event of his death. The suit has abated by the death of the defendant, and the plaintiffs must take their remedy against his personal representatives.

Motion denied.

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Steele v. Mott.

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## STEELE vs. MOTT.

A plaintiff suing *in forma pauperis*, is not liable to costs for not proceeding to trial pursuant to notice; nor is he, *it seems*, liable to costs under any circumstances, until he is dispaupered. The order allowing him to sue as a poor person will be annulled on motion, upon cause shown, and then he will be liable to costs in the same manner as though the order had never been made.

*P. Cagger*, for the defendant, moved for judgment as in case of nonsuit, for the neglect of the plaintiff in not trying the cause pursuant to notice. The plaintiff sued in *forma pauperis*; but it was insisted that he was liable to costs for his defaults, although not liable for the final costs of the cause.

*I. Williams*, contra, read an affidavit showing that the cause was not tried in consequence of the absence of a witness who had been duly subpoenaed, and that a stipulation to try at the next circuit had been delivered to the defendant's attorney since notice was given of this motion.

*By the Court*, BRONSON, J. The defendant has, already, a stipulation that this cause shall be tried at the next circuit, and the default at the last is fully excused. The plaintiff is not liable for costs until he is dispaupered. 1 *Bos. & Pull.* 39. 2 *Stra.* 1121. 3 *Wils.* 24. Our statute has not given a different rule. 2 *R. S.* 445, § 5. Should the plaintiff be guilty of improper conduct in the prosecution of the suit, or of any wilful or unnecessary delay, the order allowing him to sue as a poor person will be annulled on motion, and he will then be liable to costs in the same manner as though the order had never been made.

Motion denied.



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*Sands v. Bullock.*

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**SANDS and others vs. BULLOCK, impleaded with Fisk.**

Where a suit was commenced by the filing and service of a declaration against the maker and endorser of a promissory note, and the declaration was served upon the endorser alone, who appeared in due time and put in a plea of the general issue, entitling it however as though he had been sued alone, not saying *impleaded with, &c.*, and the plaintiff's attorney, with knowledge that it was intended as a plea in the cause, after retaining the plea seven days, treated it as a nullity, and entered the defendant's default: *it was held*, that the default was irregular, it being the duty of the plaintiff's attorney to return the plea, or apprise the defendant that it was not regarded as sufficient.

Here again costs refused, because papers for motion stuffed with unnecessary matter.

MOTION by defendant to set aside default and subsequent proceedings. The plaintiffs commenced a suit by the filing and service of a declaration, against *Fisk* as the maker, and *Bullock* as the endorser of a promissory note, but the declaration was only served on *Bullock*. He appeared in due time and put in a plea of the general issue, which was entitled and pleaded in the same form as though he had been sued alone, without saying *impleaded with, &c.* The plaintiffs' attorney knew that it was intended as a plea in this cause; but seven days afterwards he treated the plea as a nullity, entered the default of *Bullock*, and perfected judgment, and issued execution against him. Both attorneys resided in the city of New-York, the plea was not returned to the defendant's attorney, nor was he informed that it was not deemed sufficient.

*D. Burwell*, for the motion.

*P. Cagger*, contra.

*By the Court.* BRONSON, J. Although the plea was informal, it was not a nullity. *Dale v. Beer*, 7 East. 335. It should have been returned, or the defendant's attorney should have been informed that it was not regarded as sufficient.

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Corlies v. Holmes.

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I shall give no costs of the motion, because the defendant's papers are stuffed with unnecessary matter. Both parties must have expected to get costs, for the papers on each side contain copies of the pleadings at large, which were wholly unnecessary. In such cases we give no costs.

Motion granted.

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CORLIES & CORLIES vs. HOLMES & ROBINSON.

The service of a declaration on a defendant in a suit commenced by the filing and service of a declaration, is not a violation of the statute, forbidding the service of *civil process* on an elector during the time appointed for the election of state and county officers.

*J. Holmes, jun.*, for the defendants, moved to set aside the proceedings, on the ground that the action was commenced by the service of a declaration upon the defendants, on one of the days of the last general election, they being electors and entitled to vote in the town where the declaration was served. He cited 1 R. S. 127, § 4, which provides, that "whenever an election shall be held in any city or town pursuant to this chapter, no *civil process* shall be served in such city or town on any elector entitled to vote therein, on either of the days during which such election shall be held."

*W. Tracy*, for the plaintiffs, cited a MS. case of *The Bank of Utica v. Hackley*, decided in June 1837, where the court refused to set aside a declaration served upon an elector on the day of the annual town meeting. 1 R. S. 342, § 10.

*By the Court*, BRONSON, J. The statute undoubtedly extends to all writs, whether original or judicial, and to every warrant or summons, by which a man is called into court to answer in a civil action as a party; and to executions against the body; and it makes no difference whether the process beailable or not. But although suits may now be commenced by the filing and service

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Bowne v. Cribb.

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of a declaration, 2 R. S. 347, § 1, 2, I am unable to say that this case comes within the prohibition of the statute. A declaration has never been regarded in the law as "civil process." It is not a writ or command, addressed by public authority to an officer or minister of justice ; and the mere delivery of a declaration on the day of election, whether by an officer or any one else, would not be likely to disturb or overawe an elector in the exercise of his privilege. The case cited by the plaintiffs' counsel, is decisive against the motion. See also *Wheelerv. Bartlett*, 1 *Edw. V. C. Rep.* 323.

It is said that an elector might be disturbed in his feelings by the service of a declaration on the day of election. The remark would be equally true, if applied to the service of an execution upon his property ; and yet that is not forbidden. The statute only extends to process which is served on the person of the elector.

Motion denied.

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BOWNE and others vs. CRIBB.

On application for a *discovery* of books, papers and documents relating to the merits of a suit or of a defence therein, the court exercise a discretion whether they will interfere or send the party to chancery. Where the discovery sought relates to remote and complicated transactions extending through a long period of time, no order will be made in respect thereto ; but if there be documents of a recent date they will be directed to be produced.

MOTION for a discovery. The action is ejectment for the recovery of a portion of a large tract of land originally sold by Robert Bowne, the ancestor of the plaintiffs, to Thomas R. Gold, who executed the mortgage to secure the consideration money. Gold sold to one *Marvel Ellis* subject to the mortgage. It was alleged by the defendant that by an agreement between Robert Bowne and Ellis, the mortgage executed by Gold was foreclosed in chancery, and the equity of redemption of Gold and all persons claiming under him, bought in by the mortgagee ; that it was, however, agreed that Ellis, notwithstanding the foreclosure, might continue to make sales of the land, and turn over the con-

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Bowne v. Cribb.

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tracts to Robert Bowne, and if sales should be effected to an amount sufficient to extinguish the debt originally due from Gold, then that Bowne or his heirs should convey to Ellis whatever of the tract remained unsold. It was now alleged that Robert Bowne and his heirs had, from the sales of the tract, realized an amount more than sufficient to pay and satisfy the debt, &c. The defendant, who holds under title derived from Marvel Ellis, asked for a discovery.

*B. F. Cooper*, for the motion.

*M. T. Reynolds*, contra.

*By the Court*, NELSON, Ch. J. This application is founded upon the idea, that if the defendant can establish, on the trial, the *payment* of the sum due upon the Gold mortgage, as fixed in the contract on the 10th January, 1799, he will thereby extinguish the claim of the plaintiffs to the premises in question—contending that their ancestor is to be regarded only as a mortgagee. Whether the case will ultimately turn upon this view at the trial, is quite uncertain, from the papers before me; but if the question may arise and become material, it is enough to authorize a discovery under the statute, 2 R. S. 199, provided a proper foundation is laid.

The sales of the tract (the monies arising from which it is alleged were to be applied upon the mortgage) cover a period of some thirty or more years, and we are asked to require the books, contracts, correspondence, &c., embracing the agency for this time, to be delivered for inspection, and copies to be taken by the counsel for defendant, or that sworn copies be delivered by the plaintiffs. It is most obvious that the investigation of these complicated and remote transactions, involving the management and sale of some nine thousand acres of land, extending through this period of time, is a very unfit subject for a circuit court, if not entirely beyond its power to hear and judiciously dispose of. The statute is not imperative; we are only

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Smith v. Durkee.

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to exercise the authority for enforcing a discovery "in such cases as shall be deemed proper." § 21. I am satisfied that if the question contemplated by this application is ever reached in the course of the litigation, the only practicable remedy for the defendant will be found in a resort to a court of equity. There the mortgagee may be called to an account, and the sums received or lots appropriated to his own use or for his benefit, valued; and the whole subject deliberately examined and settled. The circuits ought not to be thus encumbered, and the ordinary business interrupted. We should therefore be justified in refusing the application for the above considerations.

It appears, however, from the affidavit of the agent (Mr. Seymour) confirmed by that of the Messrs. Bowne, that, in 1835, and before this litigation commenced, Mr. Seymour rendered an authentic account of moneys received on sales, and outstanding on contract, at the request, and for the executors of the elder Bowne. This statement may, possibly, aid the defendant, if not answer the purpose for which the discovery is sought. Beyond this I cannot extend it. The correspondence sought for is sufficiently denied in the affidavit of the Messrs. Bowne.

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SMITH and others vs. DURKEE.

Where an attorney has not an *agent* at the places required by the rules for the receipt of papers, and a paper is put into the post-office directed to him, the day the paper is *mailed*, and not when it is received, is the day of service.

ON a motion to set aside a default for not pleading, as *irregularly* entered, *it was held*, that putting a plea into the post-office, directed to the plaintiff's attorney at his place of residence, when the attorney has not an agent at either of the places required by the rules of the court, was equivalent to the service of a paper upon an agent; and the service was deemed to have been made *on the day the plea was mailed*, and not when, according to the course of the mail, the plea was received by the plaintiff's attorney.

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 In the matter of Carlton-street.
 

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In the matter of CARLTON-STREET, in the city of Brooklyn.

In street cases, it is a matter of course to grant a *certiorari*, after confirmation of report of the commissioners of estimate and assessment, where the object of the party is to remove the proceedings into the court for the correction of errors.

*J. L. Wendell* moved for the allowance of a *certiorari*, to be directed to this court, acting as *commissioners* on the motion to confirm the report of the commissioners of estimate and assessment in the above entitled matter, as preparatory to the suing out of a writ of error, to remove the proceedings into the court for the correction of errors.

*M. T. Reynolds* was proceeding to oppose the motion, on the ground, that there were no errors to be corrected, but was stopped by

Mr. Justice COWEN, who observed, that on a motion of this kind, the decision of the court on the confirmation of the report would not be reviewed; that the *certiorari* being asked for the purpose avowed, it was a matter of course to grant it, the proceeding being in substance the same as drawing up a case in a subordinate court for the purpose of enabling a party to prosecute a writ of error, which this court would require to be done.

Motion granted.

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In the matter of ART-STREET, in the city of New-York.

In street cases, where money is awarded to the estate of a person deceased, it is not necessary on an application to the court by the persons entitled to such estate for an order that the money be paid over, to show a publication of notice of such application in a public newspaper; it is otherwise, however, where the money is awarded to owners unknown.

In the latter case, also, *security* for refunding the money on the happening of certain events, will be required; but not in the former.

In the improving of this street, a piece of ground was taken, which the commissioners of estimate and assessment in their re-

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In the matter of Art-street.

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port, stated to belong *to the estate of John Vark deceased*, and that in consequence of the taking of such ground, they had allowed as damage, the sum of \$8,600 *to the estate of John Vark deceased*; which sum has since been paid into court. A petition is now presented by the children of John Vark deceased, stating that they are the *heirs and devisees* of their father; which petition is verified by their affidavits and by a certified copy of the last will and testament of John Vark, and is accompanied by a map on which is delineated the premises taken; and application is now made for a rule directing the clerk to pay over the moneys thus deposited to the petitioners or their attorney. Notice of the application was given to the counsel of the corporation, but was *not published* in any of the newspapers of the city.

Mr. Justice Cowen granted the application, observing that this case differed from the cases where moneys are awarded to *owners unknown*, in which in addition to what had been done by the petitioners here, the court required the publication in a newspaper of a notice of the intended application. In those cases also, the court had latterly required *security* to be given by the petitioners for the return of the money when required so to do; but in this case neither the publication of a notice or security were necessary. The papers would be referred to the clerk, and if found to be right, a rule for paying over the moneys would be entered.

AN

# INDEX

TO

## THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

A

### ABSCONDING, CONCEALED AND NON-RESIDENT DEBTORS.

1. In a proceeding by attachment against a non-resident debtor, who is sought to be charged as a debtor of a foreign bank, the president and directors of which are by its charter declared to be individually liable for all notes, &c. issued by the bank, it is not necessary for the purpose of showing personal liability, that the charter should be produced as part of the preliminary proofs, on the application for process. *Ex parte Van Riper*. 614
2. On a motion to set aside the attachment, the court will enquire into the personal liability of the person sought to be charged, and will hold him personally liable if the charter of the bank declares that he shall be so held. *id*
3. It is no objection to the remedy by attachment, that the act of incorporation gives an action in the ordinary mode, in which the plaintiff may declare, &c. A party to whom an action is thus given, is not confined thereto, but may resort to any form of remedy known to the law, and he may do so in any place where the debtor or his property can be found. *id*

### ACTIONS IN GENERAL.

The mere making out of a writ and obtaining a special deputation from the sheriff, is not the commencement of a suit; until delivery to the special deputy, the suit is not commenced. *Boughton v. Bruce*, 234

### AGENCY, See PRINCIPAL AND AGENT.

### ALIENS.

1. Where a naturalized citizen died in 1833, seized of real estate, the title to which he acquired in 1824, under a contract of purchase made in 1810, of which real estate he had been in possession ever since, and an action of ejectment was brought by a brother and two sisters of the deceased who were aliens at the time of his death, and who had not complied with the requirements of the act relative to aliens passed in 1825: IT WAS HELD that the plaintiffs by reason of their alienage were incapable of inheriting the estate of their deceased brother, although they had been residents of this state since 1805. *Kennedy v. Wood*, 230
2. It was further held, that the plaintiffs could not claim any thing under the equitable estate in the premises existing in the deceased previous to his obtaining the legal title; the acts on this subject recognizing only legal estates. *id*



3. Whatever rights the plaintiffs had (if any) under the acts of 1802 and 1808, were destroyed by the act of 1825, which applies as well to *aliens* who had before its passage come to reside here, as to those who should subsequently arrive. *id*
4. The *widow* of a natural born citizen who was an *alien* when the act passed in 1802, *enabling aliens to purchase and hold real estate*, is not entitled to dower under the provisions of that act, where the lands in which dower is claimed were acquired by the husband, and the marriage took place *previous to the passage of the act*. *Priest v. Cummings*, 338
5. A *feme covert* who is an *alien* may be naturalized; but her naturalization has not, under the general acts of congress, a retroactive operation, so as to entitle her to dower in lands of which her husband was seized during coverture, and which he had aliened previous to her naturalization.\* *id*

\* The Chancellor, in commenting upon the case of *Sutliff v. Forgey*, 1 Cowen, 89, and 5 *id*. 715, S. C. in error, where the alien widow of a naturalized citizen was permitted to recover dower in lands purchased by the husband, and conveyed to him during the coverture, expresses the opinion that the decision in that case was made upon the ground that the widow was at the time of the purchase by the husband *capable* under the enabling act of 1802, of purchasing and holding real estate, and that by the same conveyance under which her husband took and at the same moment when he became seized she became a purchaser, within the meaning of the act, of an inchoate right of dower; and that had the lands in the principal case been acquired subsequent to the act of 1802, whilst the plaintiff was an *alien*, and had she possessed at the time a legal capacity under the enabling act to purchase and hold real estate, that she would by the purchase of her husband have acquired an inchoate right of dower, which on the decease of her husband would have become absolute.

Senator VERPLANCK concurs with the chancellor in his view of the case of *Sutliff v. Forgey*; and upon the principal question, holds that a woman, an *alien* at the time of her marriage, is not entitled, under the act enabling aliens to purchase and hold real estate, to claim dower in lands whereof her

husband, a natural born citizen, was seized before her marriage, because: 1. title by dower is by act or operation of law and not by purchase; and 2, because the word *purchase*, as found in the enabling statutes, is not used in its technical sense as indicating one of the two modes in which only it is said that title to real property can be acquired, i. e. by descent or purchase, but that it is used in its ordinary and generally received sense, signifying the buying of land.

In respect to the effect of the naturalization of the plaintiff, Senator VERPLANCK concurs with the chancellor in the conclusion at which he arrived, as stated above—he holds that from the phraseology of the naturalization laws themselves, as well as from other considerations, the effect of a naturalization here is the same as that of a denization in England, i. e. that it is not retroactive but prospective; that the *feme* becomes entitled to dower out of all the lands whereof her husband was seized at the time of her naturalization, but not out of lands whereof her husband had been previously seized, and which before her naturalization, he had aliened. Upon this point the Chancellor, in the opinion delivered by him, exhibits the same view of the question.

Senator WAGER delivered an opinion for an affirmance of the judgments in the courts below, upon the principal of *stare decisis*; he considering the decision in the case of *Sutliff v. Forgey* as controlling this case.

#### AMENDMENTS.

1. In an action of *assumpsit* for money had and received, brought by executors counting upon promises to the testator, an amendment was allowed after a report of referees, by permitting the plaintiffs to allege the promises to have been made to them as executors; it appearing on the hearing, that the moneys were received by the defendant subsequent to the death of the testator, though upon a retainer anterior to that time. *Flower's ex'rs v. Garr*, 668
2. The only costs allowed the defendant, were those of preparing to set aside the report, and of opposing the motion. *id*
3. It was held no objection to the motion that the cause was brought into this court by *certiorari* from a court of common pleas; the same power being exercised in such cases over the

pleadings, which is exercised in suits brought here originally. *id*

APPEAL FROM CHANCERY.

See COURT FOR THE CORRECTION OF ERRORS.

ARREST OF SHIPS.

See SHIPS AND VESSELS.

ASSUMPSIT.

Where a contract is made upon an assumed state of facts in reference to which there is a *mutual mistake*, money paid under such contract may be recovered back, *pro tanto*, in an action of assumpsit; and *it was accordingly held* in this case, where a contract was made for the sale and delivery of oats, and the parties, upon a mistaken state of facts, estimated the quantity at a certain number of bushels, for which the stipulated price was paid, that the purchaser was entitled to recover back money paid for the difference between the estimated and real quantity; and that, notwithstanding he had agreed to take the oats at the estimated quantity, *hit or miss*.

Wheaton v. Olds, 174

ATTACHMENT.

See COSTS. COURTS OF JUSTICES OF THE PEACE. PRACTICE.

ATTORNEY.

A sheriff, sued for an act done by him in the execution of process is entitled to take upon himself the conduct of the defence and to retain such attorney as he sees fit, notwithstanding that he was indemnified by the party suing out the process.

Peck v. Acker, 605

B

BAIL, (SPECIAL)

See PRACTICE, 1.

BAILMENT.

The mere shipment of merchandize does not confer upon the master of the vessel authority to dispose of the goods, unless in a case of necessity; and then the burthen of proof showing the necessity lies upon the purchaser. A carrier by sea and a carrier by land stand in the same

relation to the owner of the goods. *Baltus v. Everett.* 267

See DAMAGES, 5.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bill of exchange drawn in one state of the Union upon persons residing in another, is to be treated as a *foreign bill*, and a *protest*, apparently under the seal of a *notary public*, made in the state where the drawees reside, need only be produced, and *proves itself* as to the *presentment and refusal*; and so also, *it seems* as to the transmission of *notice* to the parties on the bill, if such fact be stated in the protest.

Holiday v. McDougall, 81

2. Where the notary is *dead*, a sworn copy of the protest taken from his record book of notarial protests, together with the original protest, is abundant evidence of the presentment and refusal. *id*

3. *Checks* are governed in several particulars by the same rules that prevail in relation to *inland bills of exchange* payable either *on demand* or at a given number of days *after sight*. *Smith v. Jones,* 192

4. The holder of a check can recover against the *endorser* only when he has used *due diligence* in presenting or giving notice of demand and non-payment. *id*

5. Where the parties all reside in the same place the check should be presented on the day it is received, or on the following day; and when payable at a different place from that in which it is negotiated, it should be *forwarded by the mail* on the same or the next succeeding day for presentment. *id*

6. No greater diligence is necessary in presenting *checks* for payment, than is required in relation to *bills of exchange*. *id*

7. In an action by a *second endorsee* of a check against the payee, *laches* on the part of the first endorsee *will not be presumed*; if there was negligence on his part it must be affirmatively shown by the defendant. *id*

8. So where the *second endorsee* has put the check in *circulation*, *laches* will not be presumed in a subsequent holder, where the bill was in circula-

- tion only four or five days after the second endorsee parted with it, before it was sent for presentment; if there be a default, the burden, of the proof rests upon the defendant. *id*
9. But where, by the course of the mail, the check may be presented in *three days*, and the holder instead of putting it in circulation, *holds it in his possession* seven or eight days, he is chargeable with want of due diligence. *id*
10. *How long a bill or check, payable on demand or at a given number of days after sight, may be kept in circulation* before presentment, without discharging an endorser, is an unsettled question. Each case must be determined by its own circumstances. *id*
11. Where a *second endorsee* of a check on receiving it *put it in circulation*, and not more than *four or five days* elapsed thereafter before it was sent for presentment, *it was held*, in an action by him against the payee, that he was not chargeable with *laches*; there being no evidences in the case but that he became the holder on the day it was negotiated by the payee. *id*
12. Where a *notary* certifies that he deposited in the post office notices of protest for the endorsers, it will be presumed that such notices were directed to them. *id*
13. To charge the endorser of a *post-dated bank check* falling due on *Sunday*, presentment for payment must be made on the next day and notice given to the endorser; presentment on *Saturday*, the day preceding its maturity, is a nullity, and discharges the endorser. *Salter v Burt*, 205
14. All the partners of a firm are bound by a note made by one of the partners in the name of the firm for his *individual benefit*, even though it be *fraudulently* put into circulation as it respects himself, if the note before maturity comes into the hands of a *bona fide* holder. *Wells & Spring v. Evans*, 251
15. An agent receiving for collection, before maturity, a bill payable on a particular day after date, is held to strict vigilance in making presentment for acceptance; and if chargeable with negligence, is subject to the payment of all damages sustained by the owner. *Allen v. Suydam*, 321
16. Where the debt is lost through the negligence of the agent, the measure of damages *prima facie*, is the amount of the bill; the defendant is at liberty, however, to show circumstances, if any exist, tending to mitigate damages or to reduce the recovery to a nominal amount. *id*
- See FRAUDS, 1.
- BILL OF SALE OF PERSONAL PROPERTY.
- See FRAUDS.
- C
- CERTIORARI, (COMMON LAW.)
1. On a return to a *certiorari* to remove proceedings had by a *landlord* against his *tenant*, under the act authorizing *summary proceedings*, to obtain the possession of land for non-payment of rent, &c. this court will not look into the evidence to determine whether the verdict is supported by it; the rule will be adhered to as laid down in *Birdsall v. Phillips*, 17 *Wendall*, 464. *Simpson v. Rhinelanders*, 103
2. The rule prevailing in England, that on *summary convictions upon penal statutes* the evidence must be stated, was not intended to be questioned in *Birdsall v. Phillips*; but the court hold that it does not apply to *orders or other adjudications*. *id*
3. On a common law *certiorari*, if the justice had jurisdiction, his judgment will not be reversed, though it be rendered, on an insufficient declaration or defective proof; nor will such judgment be reversed, although it be for an amount nearly double the sum alleged by the plaintiff to be due to him on obtaining the attachment. *Johnson v. Moss*, 145  
See also *Same v. Same*, 148
4. In summary proceedings by *landlord* against *tenant* to obtain possession of demised premises, this court have no authority under the *common law certiorari* to quash the proceedings, although the officer having charge of the matter *improperly refused to grant an adjournment*; nor have they authority to do so, although it appear from the return that the *title of the landlord had expired*, and yet that a verdict was found in his favor, and that the tenant was dispossessed. *Wilson v. Green*, 189
5. A return to a *certiorari* cannot be contradicted by an assignment of

errors, nor can a fact be specially assigned showing a want of jurisdiction in the tribunal to which the certiorari is sent.

*Haines v. Judges of Westchester*, 625

6. It seems that an assignment of errors is a proceeding not applicable to the case of a common law certiorari. *id*
7. In street cases it is a matter of course to grant a certiorari, after confirmation of the report of the commissioners of estimates and assessments, where the object of the party is to remove the proceedings into the court for the correction of errors. In the matter of *Carlton street*, 685  
*Champerty*, 212

#### CHANCERY.

1. A decree of foreclosure of the equity of redemption, and a sale in pursuance thereof on a bill filed against the mortgagor alone, do not affect the rights of purchasers deriving title to the premises from and under the mortgagor and who were not made parties to the bill in equity. *Watson v. Spence*, 260
2. After forfeiture, a mortgagee in possession may continue to hold until payment of the mortgage monies, and so may his assignees; but not so a purchaser, under a decree against the mortgagor on a bill filed against him alone, after all interest in the premises has passed from him by conveyance or by operation of law. The decree in such case is void for want of jurisdiction in the court of chancery, as it respects the purchasers under the mortgagor, and consequently all subsequent proceedings are void. *id*
3. To give effect to a decree in chancery, notice of the suit must be brought home to the party to be affected by it; if his name appear in the record, notice will be presumed, not otherwise. *id*
4. A purchaser, under a void decree in possession of land, is viewed as a stranger, and cannot protect himself against the owner of the equity of redemption, by setting up an outstanding title in the mortgagee, at whose suit the decree was obtained. *id*
5. To entitle a party to claim a discovery, he must show a perfect *prima facie* title in himself, before he can call upon the party in possession to disclose his title. *Van Kleeck and the Dutch Church*, 457
6. A party who in a court of equity has permitted a defence which would have been there overruled, if objected to,

is not permitted to raise the objection, for the first time, when the cause is brought by appeal into the court of dernier resort. *Waller and Harris*, 555

#### CONSIDERATION.

1. The release of a lien obtained by the suing out of an attachment, is a good consideration for the promise of a third person to pay the debt of the party proceeded against by such process. *Smith v. Weed*, 184
2. An agreement to forbear to sue a debtor is a good consideration for the promise of a third person to pay the debt; but to render the promise obligatory, it must be in writing. *Watson v. Randall*, 201

#### CONSTITUTIONAL LAW.

1. A private act of the legislature authorizing the sale of the estate of infants, for their maintenance and education, is within the scope of the legitimate authority of a state legislature. *Cockran v. Van Surlay*, 365
2. Such act is constitutional; it neither violates the provision of the constitution of this state, adopted in 1776, viz. that no member of this state shall be disfranchised or deprived of his rights, unless by the law of the land or the judgment of his peers; nor the provision of the constitution of the United States inhibiting the passage of laws impairing the obligation of contracts.\* *id*

\* Senator VERPLANCK, in the opinion delivered by him in this case, controverts the position "that acts of the legislature contrary to the first principles of right," are void. He denies the power of the courts to annul an act of the LEGISLATURE, by declaring it void on the assumed ground of its being contrary to natural equity; and insists that such power can properly be exercised only when clearly derived from express constitutional provisions, (and those strictly construed,) limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberative wisdom of the nation. *id*

See page 59.

#### CONSTRUCTION OF STATUTES.

See CONSTITUTIONAL LAW.

#### CONTRACTS.

1. On a note payable in ready made cloth, the payee has no right to de-

- mand a garment which has been made for a customer at a stipulated price. *Vance v. Bloomer*, 196
2. The holder of a note of this kind, it seems, may demand payment of it in parcels, and is not bound to take clothing to its full amount at one time. *id*
  3. So it seems, that to sustain an action on such note, there must be a demand and refusal. *id*
  4. When the day of the performance of contracts, other than instruments upon which days of grace are allowed falls on Sunday, that day is not counted, and compliance with the stipulations of the contract on the next day (Monday) is deemed in law a performance. *Salter v. Burt*, 205
  5. A contract entered into guaranteeing the payment of a note is not void on the ground of maintenance, but may be enforced in an action at law, although entered into for the express purpose of inducing the holder of the note to release a former holder who had transferred the note and guaranteed its payment, so as to render him a competent witness in an action for the recovery of the note. *Mott v. Small*, 212
  6. It seems that by the revised statutes, the offence of unlawful maintenance is abolished, except as to buying and selling pretended titles to land, and falsely moving and maintaining suits. *id*
  7. Where notes are delivered as collateral security for the payment of another note made upon an usurious agreement, the party depositing the notes may repudiate the agreement under which they were delivered, and bring an action of replevin for their recovery; but there must be a demand before suit. *Boughton v. Bruce*, 234
  8. Where a banking company, incorporated in another state, kept an office in the city of New-York for the purpose of discounting notes and issuing bills to be put in circulation as money, and the president of such company entered into an agreement with a broker of New-York to receive of him all notes of the banking company which he should procure in his business as a broker, and pay him the amount thereof in cash, deducting a discount of one eighth of one per cent., it was HELD, on demurrer to pleas alleging those facts and averring that the agreement was entered into to aid the banking company in the above operations, and that by means thereof, and the acts of the plaintiff under the agreement, the banking company was the better enabled to carry on its operations and business of discounting and issuing notes at their office in the city of New York, that the agreement was void, as made with the design to violate the provisions of the statute of this state forbidding all associations, (unless expressly authorized so to do) to keep an office within this state, for the purpose of discounting notes, or issuing bills to be loaned or put in circulation as money.\* *D. Groot v. Van Duzer*, 390
- \* Senator VERPLANCE, in the dissenting opinion delivered by him, holds the agreement to be valid, as it is not averred that the plaintiff was a guilty participator in the transaction, as far as the violation of the law is concerned, or that he had even deviated from the ordinary course of his business in consequence of the agreement; that his general knowledge, that the arrangement would indirectly aid the banking company, did not vitiate the agreement, as he might well be deemed to have had no other intention than to give a general currency to the bills of the bank, and not to aid in the infraction of the law, by the issuing of bills within this state.
- See CONSIDERATION, 1. FRAUDS, 1, 2.

## CORPORATIONS.

1. A notice by a turnpike inspector that a turnpike road is out of repair, to subject a gate keeper to a penalty for taking tolls after an order to throw open the gate, must specify the part of the road which is out of repair, unless the whole road be out of repair, and in that case it should be so stated in totidem verbis. *Braden v. Berry*, 55
2. An action of *assumpsit* lies against a monied corporation, for refusing to permit a transfer of its stock upon the books of the corporation, when by the act of incorporation such transfer is necessary to give validity to the transaction; *case* would lie, but *assumpsit* may be maintained. *Kortwright v. Buffalo Com. Bank*, 91
3. A certificate of stock is transferable by a blank endorsement, which may be filled up by the holder, by writing an assignment and a power of attorney over the signature endorsed. *id*

4. Proof of usage as to this mode of transferring stocks is admissible; but independent of such evidence, authority to fill up the blank endorsement will be inferred. *id*

5. A plaintiff in such case is not limited to a recovery of the mere excess in the value of the stock above par, but is entitled to recover the full value of the stock at its highest price, between the time of the refusal to permit a transfer and the time of the commencement of the suit. *id*

See COSTS. NEW-YORK, CITY OF. PLEADINGS, 2.

COSTS.

1. In an action on a bond, other than for the payment of money, where the plaintiff assigns several breaches, the defendant is not entitled to costs, although the plaintiff fail in establishing several of the breaches assigned by him, if the plaintiff succeed upon any one breach; the defendant is not entitled to costs unless the plaintiff fail upon all the breaches. *Fairbanks v. Camp and others*, 600

2. A party who takes an assignment of a verdict from the plaintiff in a cause, during the pendency of a motion for a new trial, as collateral security for the payment of a debt and for responsibilities assumed, and a new trial is subsequently granted and judgment as in case of nonsuit afterwards obtained by the defendant for the neglect of the plaintiff to bring the cause to trial, the assignee is not liable to the costs of the defence if after the assignment he takes no part in the prosecution of the suit; and even if he does, it seems he would not be liable. It seems, had the plaintiff on the record retained no interest whatever in the subject matter of the assignment, that the assignee would have been held liable. *Miller v. Franklin*, 630

3. Where in a joint action of ejectment by five plaintiffs, who claim the whole of the premises in question, three succeed and recover judgment for one fourth of the premises, and two fail in maintaining their action, the parties succeeding are entitled to a full bill of costs, deducting such charges as exclusively relate to the two plaintiffs who have been defeated. *Hinman and others v. Booth*, 666

4. So on the other hand, the defendant is entitled to a full bill of costs against

the failing plaintiffs, deducting such portions of the costs of the defence as relate exclusively to the prevailing plaintiffs. *id*

5. The two failing plaintiffs are jointly liable for the whole costs which the defendant is entitled to recover, although one abandons the prosecution sooner than the other. *id*

6. In an action commenced by attachment against a foreign corporation, for the recovery of bills or bank notes issued by it, the plaintiff in his bill of costs is entitled to charge for copies of the bills or notes produced to the officer issuing the attachment; also for copies of the same filed with the declaration, where that contains only the money counts; also for copies of the same inserted in the judgment record, where the judgment is by assessment after a default for not pleading. *Benham v. The Lumberman's Bank*, 673

7. The plaintiff is not entitled to charge for copies of the notes or bills voluntarily served with the declaration; nor for copies of the same inserted in the circuit roll where there is a defence, or in the judgment roll where there is a verdict. *id*

8. It seems that it is necessary to insert copies of the bills or notes in the circuit roll only where the plaintiff includes several different parties, as drawer or maker and endorser, in the same action. *id*

9. Although proceedings are set aside as irregular, no costs will be allowed to the prevailing party, if his papers are stuffed with unnecessary voluminous matter. *City of Buffalo v. Scranton*, 676  
*Sands v. Bullock*, 680

See AMENDMENTS.

COURT FOR THE CORRECTION OF ERRORS.

1. Where a party in chancery in whose favor a decree or order has been made, dies after the entry of the decree or order, and previous to the service of notice of the same, and the opposite party is desirous to appeal to the court for the correction of errors, his course is to defer the prosecution of the appeal until the suit has been revived in chancery in favor of the proper representatives of the deceased, and due notice given him of the decree or order by the solicitor of

- the substituted parties ; notice given by the solicitor of the party deceased, may be regarded as a nullity. *Anderson and Anderson*, 585
2. So where there is an abatement after notice of appeal, and before the petition of appeal is presented, it seems, the practice is to revive the cause in the inferior court, by bringing in the representatives of the deceased party; but where either party dies after the appeal is presented in the appellate court, the practice is to bring in the proper parties. It is not necessary in such case to revive the cause in the inferior court, as was done in *Wilson v. Hamilton*, 9 Johns. R. 442. *id*
  3. It seems, that if a party in whose favor the decree was made should die after notice of the decree given to the opposite party, and within the fifteen days allowed for appealing, that an appeal would be held valid if the petition of appeal and the bond required by statute in cases of appeal were dated as of a day anterior to the death of the deceased party. *id*
  4. Where an appeal was made after a suit abated, and before a revival in the court below, and a bond was executed to the representatives of the deceased party, it was held, that the bond was void and the appeal irregular. *id*
  5. A decree of the court of chancery for the appointment of a receiver, on the petition of the stockholders of an insurance company, is equivalent to an order for the assignment and delivery of the securities, evidences of debt, chattels and things in action belonging to such company. *The Sea Ins. Co. and Ward*, 588
  6. To stay the execution of such decree for the purpose of prosecuting an appeal, the party against whom the decree is made is bound to bring the property into court, or to execute a bond to the opposite party, with two sufficient sureties in a penalty at least double the value of the property, conditioned to abide the order of the court for the correction of errors; a bond conditioned only for the prosecution of the appeal and for the payment of costs and damages that may be awarded against the appellant, is not enough to stay the issuing or execution of process to enforce the decree. *id*
  7. When such a decree has been appealed from, it seems that the chancellor has lost all jurisdiction over the matter, so that he cannot modify an injunction in respect to the property which by the same decree was ordered to be issued. Whether the court for the correction of errors will, under any circumstances, previous to the hearing of the appeal, modify or dissolve an injunction thus issued, *quere?* *id*
- ### COURTS OF JUSTICES OF THE PEACE.
1. It is not enough to justify the issuing of a warrant against a debtor, on the ground of an intent fraudulently to dispose of his property, that he has executed a mortgage of a portion thereof, and refused to confess a judgment or to give security, declaring a determination to manage his property himself. *Connell v. Lascells*, 77
  2. Where an action of trespass *quare clausum fregit* is prosecuted in a justice's court, all proceedings there must be suspended on the defendant's putting in a plea of title, or on its appearing by the plaintiff's own showing that the title to land is in question. *Willoughby v. Jenks*, 96
  3. An affidavit to obtain an attachment against a party for having departed the county, with intent to defraud his creditors, is good, although the applicant swears only to his belief as to the intent, provided he sets forth the facts and circumstances upon which such belief is founded. *Johnston v. Moss*, 145
  4. Where the proceeding is under the provisions of the revised statutes, it is no objection that there are more than four days between the teste and return of the process. *id*
  5. A return of a constable, that by virtue of an attachment against A. B. he had levied on certain property, will be intended to be a return that he had levied upon the property of the defendant. *id*
  6. Whether an action will lie on a judgment obtained when the process is by attachment until the property taken on the attachment be sold; and whether a second attachment can be sued out on such judgment before the property taken on the first be sold, *quere*. *Johnson v. Moss*, 148

7. The powers of a justice to issue an *attachment*, as conferred by the revised statutes, are not abridged by the act to abolish imprisonment; on the contrary, they are enlarged and extended to new cases, differing however from the revised statutes as to the amount of indebtedness. The only operation of the act of 1831 on the revised statutes, is to dispense with the affidavit of *witnesses* as to the preliminary proof, and to declare the affidavit of the *plaintiff* sufficient to authorize the issuing of the process. *Smith v. Weed*, 184
8. Where property is taken under an *attachment*, the lien created thereby continues notwithstanding the giving of a bond by the debtor for its production until the issuing of an execution, and a reasonable time thereafter to make a levy. If, however, in the mean time the property be removed by the debtor beyond the jurisdiction of the officer who issued the attachment, and it be there seized under another attachment, the lien is gone, notwithstanding the issuing of an execution on the judgment under the first attachment. *Sterling v. Welcome*, 238

See TROVER, 1, 2.

#### CRIMINAL LAW.

- After a conviction, an indictment will not be quashed on the ground that during the pendency of the trial, a *second indictment* for the same offence was found by the grand jury. *The People v. Monroe Oyer and Terminer*, 108
2. The mere finding of a *second indictment* is not *per se* a supersedeas to the first; a motion to quash must be made, and made too before the trial on the first indictment has commenced; at all events, before the cause is submitted to the jury. Ordinarily a motion to quash must be made previous to plea pleaded or any evidence given in the case. *id*

#### D

#### DAMAGES.

1. In an action to recover compensation for services rendered, the employer is entitled to show, by way of recoupment of damages, loss sustained by him through the negligence of the employee. *Still v. Hall*, 51

1. An inquisition assessing the damages of a defendant in an *action of replevin* after a discontinuance of the suit, will not be set aside on the ground of the *excessiveness of the damages*, where the proceeding on the part of the plaintiff is vexatious and oppressive, and no rule of law has been violated by the jury. *Gable v. Dakin*, 17
2. A jury in such case are authorized to give smart money. *id*
3. In an *action on the case* for negligence in driving a carriage, whereby the son of the plaintiff was run over and killed: IT WAS HELD, that the loss of service of the child, and expense occasioned by the sickness of the plaintiff's wife, caused by the shock to her maternal feelings, were proper items of damage: the same being laid as *special damage* in the declaration. *Ford v. Monroe*, 210
4. *Damages* are recoverable by a bailor for time spent and expenses incurred in searching for property *wrongfully* taken from the possession of a bailee. if the same be duly claimed in the declaration. *Bennett v. Lockwood*, 223

See BILLS OF EXCHANGE, &c. 2, 3.  
CORPORATIONS, 5.

#### DEED.

1. Where a *deed* of land executed in the presence of a commissioner authorized to take the acknowledgment of conveyances, who endorsed upon it a certificate of acknowledgment, was taken by the grantor into his possession, where it remained until his death: it was held that it was inoperative for the want of delivery; the grantee not having been present at the time of its execution, no formal delivery having been made to a third person, and the grantor by his declarations showing that he intended the deed should operate in the nature of a testamentary disposition, not to take effect until his death. *Stillwell v. Hubbard*, 44
2. Where in a conveyance of premises situate on the bank of a river *not navigable*, the lines are stated to run from one of the corners of the lot to the river, and thence along the shore of said river to a certain street, the grantee takes *ad flum aquae*.\* *Starr v. Child*, 149

\*See dissenting opinion of Mr. Justice Braoxson, in which he holds that



the grant of the soil adjacent to a river not navigable, does not necessarily pass the fee of the bed of the river. He admits that the grantee, in the absence of all proof to the contrary, is *prima facie* or by common presumption the owner, but insists that such presumption like most others may be rebutted; and is of opinion that under the circumstances of this case the presumption is destroyed.

In the discussion of this case the judge advances the following proposition:

*Navigable rivers, whether fresh or salt, and without reference to the flow and reflow of the tide, belong to the public.* The rule of the common law that the flow and reflow of the tide is the criterion by which to determine whether a river is public or not, not being applicable to our great fresh water rivers, forms no part of the common law of this state.

Where a riparian owner, who claims in an action of ejectment to recover *ad flum aqua*, is not bound to show the river to be unnavigable, *quere?*

3. A *feme covert* is not barred of her right of dower by joining with her husband in the conveyance of lands, and acknowledging her execution of the deed before an officer authorized to take the acknowledgment of deeds, if, at the time of such acknowledgment, she be a *minor* within the age of twenty-one. *Priest v. Cummings*, 338

4. It seems, that such *feme covert* need not do any act disaffirming such conveyance before suit brought for the recovery of dower. *id.*

5. Where an order of sale made by the chancellor authorized a trustee to sell, or to mortgage, or to convey the premises in satisfaction of any debt owing by him, requiring, however, that every sale, and mortgage, and conveyance in satisfaction, should be approved by a master by a certificate endorsed on the deed; and a sale for cash took place, and a deed was executed without the approval of the master obtained, it was held, by a majority of the court, that the approval of a master was necessary only in the third alternative, specified above, and that consequently the deed executed on a sale for cash was valid, notwithstanding the want of such approval. *Cochran v. Van Surlay*, 865

#### DEVISE.

1. Under a clause in a will in these words, "I ordain that my beloved wife Lanah shall have the care of my farm as long as she remains my widow,

for her support and maintenance, and (that) of my children and mother, was held to give her an interest in the land *durante viduitate*, notwithstanding a subsequent clause giving the same premises to the children in fee. *Beekman v. Hudson*, 53

2. Where a testatrix devised real estate to two of her children without words of perpetuity, and directed that on the happening of a certain contingency, the estate devised should be valued, and that the devisees should pay an equal part of it to two others of her children; IT WAS HELD, that the charge thus imposed upon the devisees, gave them a fee by implication. *Fox v. Phelps*, 437

3. It was further held, that if the devise could be considered as giving an estate upon condition, that the breach of the condition by non-performance would not, *ipso facto*, operate as a forfeiture of the estate, there being no devise or limitation over restricting the continuance of the first estate; and that the only effect of a breach was to give a right of entry to the heir. *id.*

4. It was further held, that performance of the condition would be presumed, when 29 years had elapsed after the cause of action accrued before suit brought. *id.*

5. It seems that where a trust estate is created by implication, no greater estate will be implied than what is necessary to satisfy the object of the trust. *id.*

6. Property specifically devised does not go into the *residuum* where the devisee is by law incapable of taking; in such case, as well as where a devise lapses by the death of the devisee, the property descends to the heir at law: and IT WAS ACCORDINGLY HELD, where by a will made in 1722, real estate was devised to a religious corporation, and the will contained a devise to residuary devisees, that though the devise to the corporation was void *ab initio* for the purpose of passing the estate, still it was inoperative as indicating the intent of the testator, and that the devise to the corporation showing the intent of the testator not to give the property to the residuary devisees, it did not pass to them, but descended to the heir at law. *Van Kleeck and N. Y. Dutch Church*, 457

7. At the common law, a residuary devisee of real estate takes only what



the same declaration, and the defendant concedes the plaintiff's right to recover as to some, and denies it as to others of the parcels, the court on motion will, on terms, strike from the declaration the parcels, the right of the plaintiff to which is conceded, and leave the parties to litigate only as to the others. *Mower v. Mower*. 635

See CHANCERY, 1, 2, 3. Costs, 3, 4, 5.

### ELECTIONS.

See QUO WARRANTO. PRACTICE, 10.

### ERROR.

1. A writ in the nature of a writ of *error coram nobis* can properly issue only by order of the court, upon cause shown by affidavit, and after notice to the opposite party or his attorney. *Ferris v. Douglass*. 626
2. The writ will, not of itself operate as a stay of proceedings; to render it such, an order of the court is necessary, which will be granted on cause shown in the same papers on which the principal motion is founded. *id*
3. In general, a stay will be ordered only on putting in and justifying bail; and then the provisions of the statute concerning bail on writs of *error coram nobis*, should be conformed to by the party as nearly so as practicable. *id*
4. A certificate of counsel of error in the record and proceedings is not necessary on the suing out of this writ; nor need bail be given unless a stay of proceedings is desired. *id*
5. Where a writ was issued without the allowance of the court, and a motion made to quash it, an allowance *nunc pro tunc* was ordered to save the attaching the statute of limitations. *id*
6. On the denial of a motion in a subordinate court to set aside a report of referees, the party conceiving himself aggrieved is entitled to a review by writ of error of all questions of law involved in the decision, but not of questions of fact; as to the latter, the decision of the court of original jurisdiction is as final and conclusive as it is on a motion to set aside the verdict of a jury as against evidence.

*The People v. Justices of the Sup. Court of New-York*, 663

See COURT FOR THE CORRECTION OF ERRORS.

### ESCAPE.

1. An order of a court of common pleas for the discharge from custody of an imprisoned debtor who had made a voluntary assignment, is a defence to the sheriff in an action for the escape of the prisoner, although fourteen days had not elapsed between the arrest of the prisoner and the granting of the order; for the protection of the sheriff, it will be intended that the plaintiff waited full notice. *Hart v. Dubois*, 236
2. It seems, that officers acting under process regular on its face, are not affected by irregularities in the process, unless actual participants in the irregularity. *id*

### EVIDENCE,

1. A person employed as an agent in the conducting of a particular business, at a fixed salary, who by the terms of the agreement with his employers, was to receive in addition thereto, one-third of the profits of the concern, but not to be liable for any losses, was held not to be a partner, and therefore a competent witness in an action brought by his employers. *Vanderburgh v. Hull*. 70
2. The account books of a manufacturer, properly authenticated, are admissible in evidence, in an action by him against his customer, although entries were originally made by a foreman in the factory, if such entries were made only for a temporary purpose on a slate, and were from time to time transcribed by the principal into his day-book. *Sickles v. Mather*, 72
3. An employee who attends to sales no farther than merely delivering goods manufactured, and keeping a memorandum of the delivery for a temporary purpose, is not a clerk within the meaning of the rule requiring proof of the original entries. *id*
4. Where a party who had transferred a note and guaranteed its payment, obtained another person to assume his place as guarantor, and was thereupon released by the holder of



4. Where goods, amounting in the aggregate to upwards of \$100, are purchased at auction in several parcels, upon distinct and separate bids, to be paid for in a note at a future day, the whole constitutes but one contract, and the delivery of some of the parcels is sufficient to take the case, as to the residue, out of the operation of the statute of frauds. *Mills v. Hunt*, 431
5. A decree in chancery, adjudging an absolute sale of personal property by a debtor to his creditor fraudulent and void under the statute as against creditors, on appeal was affirmed in the court for the correction of errors; the property transferred being deemed to be of a value more than sufficient to satisfy the debt of the vendee; the transfer having been made during the pendency of a suit by other creditors, and the vendor having continued in possession, disposing of the property as the agent of the vendee, and receiving a compensation for his services as such agent.\* *Stoddard and others, appellants, and Butler respondent*, 507

\* The affirmance in this case was a *pro forma* affirmance; the members of the court being equally divided, viz. 12 for affirmance and 12 for reversal. Opinions were delivered by Judges Bronson and Cowen and Senator Young, for affirmance, and by Senators Dickinson and Verplanck, for reversal. The statute having declared that every sale of goods and chattels, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, shall be presumed to be fraudulent and void as against the creditors of the vendor; the judges held, in the opinions delivered by them, that a sale of chattels unaccompanied by an immediate delivery, and followed by an actual and continued change of possession, is fraudulent and void under the statute, although it be made openly, in good faith, and without any intent to defraud, unless there be something in the circumstances of the case rendering a change of possession impracticable, either from the nature or situation of the property, or the peculiar circumstances of the parties: in other words, that where there is no change of possession, unless it be shown that there was a necessity or a manifest fitness and propriety for the continuance of the possession by the

vendor, independent of benefit to him, the sale is void; that nothing can take the case out of the operation of the statute, unless the attempted explanation relates to the possession of the property; that the *bona fides* of the transaction, and the absence of all intent to defraud, is not enough to render the sale valid. In the views of the judges, Senator Young concurred.

On the other hand, Senators Dickinson and Verplanck, in the opinions delivered by them, held that though a sale unaccompanied by a change of possession is declared by the statute to be *prima facie* fraudulent and void, still if it be shown that the sale was publicly made, in good faith and without any intent to defraud creditors or purchasers, for a fair and full consideration, and that the motives for leaving the property in the possession of the vendor are such as ordinarily influence honest men, the presumption of fraud is destroyed, and the sale must be deemed valid. They also held, that in cases of this kind the question of fraudulent intent (in a court of law) is to be passed upon exclusively by the jury; that whilst it is the province of the court to determine upon the relevancy of evidence offered in the case, none offered having a direct bearing upon the question of *bona fides* should be excluded from the consideration of the jury, by the application of general rules of policy or of legal presumption growing out of the want of change of possession.

Upon the circumstances of this particular case, the judges and Senator Young on the one hand, and Senators Dickinson and Verplanck on the other, differ in their views of the fairness of the transaction, and the circumstances relied on to excuse a want of change of possession; the former holding that the property transferred was disproportioned in value to the amount of the debt intended to be satisfied; and that the motives for leaving the property in the possession of the vendor were not such as could be approved. Whereas the latter senators hold directly the reverse upon both points.

See CONSIDERATION, 1, 2. MORTGAGE OF PERSONAL PROPERTY. SALE OF CHATTELS, 3, 4.

## G

## GRANTS.

See HIGHWAYS, 4.

## H

## HIGHWAYS.

1. The *public* has not the right to use and occupy the soil of an individual adjoining navigable waters, as a *public landing and place of deposit* of property in its transit, *against the will of the owner*, although such *user* has been continued for more than twenty years. The *user* cannot be urged by the *public*, either as the foundation of a legal presumption of a *grant* and thus justify a claim by prescription, or as evidence of *dedication* of the premises to public use. *Pearsall v. Post*, 111
2. The capacity of the *public at large*, as distinguished from corporations or quasi corporations to *acquire a right* to use and occupy the soil of an individual in any manner or mode of appropriation, *other than to pass and travel over it*, and the setting up of such right as prescriptive upon the presumption of a *grant*, or that the owner has *dedicated* the premises to public use, considered, and a variety of cases cited and commented upon. *id*
3. So, also, the rights of *riparian owners* considered in respect to *ferries*, where passengers and merchandise are landed on the shores of rivers; and the distinction existing between *passing over the soil* where a road has been laid out, and *using it as a landing*. *id*
4. So also, the validity of *grants* considered, where there are no persons *in esse* capable at the time of the grant of taking as *grantees*, whether such grants be for religious or charitable purposes or to promote the cause of education. *id*
5. The commissioners of highways of the counties of Suffolk, Kings and Queens [the Long Island counties] have power to *regulate public landings and watering places* already existing, but not to *lay out and establish new public landings and watering places*. Nor can *encroachments* upon such *landings* be summarily inquired into by a jury, as may be done in cases of *encroachments upon highways*; their power is limited to highways. *id*
6. On an appeal to county judges from the determination of commissioners of highways relative to the laying out of roads, the commissioners must have *notice in writing* of the time and place of the meeting of the judges; the attendance of a majority of the commissioners, *if seems*, would be a waiver of notice, but the attendance of one will not have that effect. *The People v. Judges of Herkimer C. P.* 186
7. So, notice must be given to the occupant of the land through which the road is contemplated; and his attendance as a *witness* before the judges will not be deemed a waiver of notice. *id*

## HUSBAND AND WIFE.

1. The separate estate of a *feme covert* in the hands of *trustees*, is in equity chargeable with debts contracted for the benefit of the estate. So such estate is chargeable where a *portion* of it has been converted into *other property* in conformity to the provisions of the trust deed, and a debt is contracted for the benefit of such substituted property. *Dyett v. N. A. Coal Co.* 570
2. Ordinarily, in a suit in equity against husband and wife, where they unite in the answer, and the answer is *sworn* to by the husband alone, such answer is deemed the answer of the husband only; but where the suit against them is in respect to the *separate estate* of the wife and she unites with the husband in *signing* the answer which contains *admissions* of the cause of action, *on appeal* the wife will be held bound by such admissions, although the husband alone swore to the answer; it is then too late to object that she did not swear to the answer. *id*
3. *It seems*, that where a *feme covert* is proceeded against in respect to her *separate estate*, that though the husband must be made a party defendant, the *subpoena* to answer must be personally served on her, and in all other respects in the conduct of the suit she must be treated as a *feme sole*. *id*

## I

## INFANTS.

Where an act for the sale of the estate of infants required the assent of the *chancellor*, an *order for sale* to be made by him, and an investment of

the proceeds, so as to secure to the infants at least the *principal* of the purchase money; and the chancellor in his order authorized the proceeds of the sale to be applied, among other things, *to the payment of the debts of the father of the infants*, and a sale took place and a conveyance of the property executed: *It was held* that, the chancellor having jurisdiction in the matter, no error committed by him in directing the application of the proceeds in a manner different from that provided by the legislature, could affect the title of a *bona fide* purchaser, in an action at law, brought by the infants for the recovery of the property. *Cochran v. Van Surlay*, 365

See CONSTITUTIONAL LAW.

### INSURANCE.

1. In the insurance of a vessel on time, the warranty of *sea-worthiness* is complied with, if the vessel be in an unexceptionable condition at the commencement of the risk; and the fact that she subsequently sustained damage, and was not properly re-fitted at an intermediate port does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission. *American Ins. Co. v. Ogden*, 287
2. A defect of *sea-worthiness*, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the owner or his agents, discharges the underwriter from liability for any loss, the consequence of such want of faith, prudence or diligence; but does not affect the contract of insurance as to any other risk or loss covered by the policy, and not caused or increased by such particular defect. *id*
3. The insurer is not liable either in the case of a *technical total loss* or *actual loss*, where it appears that the necessity, the *prima facie* ground of abandonment, though real, was yet the result of *culpable negligence*, or want of *due diligence* on the part of the owner or his agents. *id*
4. Under ordinary circumstances, a vessel cannot be abandoned as for a constructive or technical total loss, on the ground of the inability of the master to obtain funds to make ne-

cessary repairs, where the owner is chargeable with want of *ordinary prudence* in furnishing funds or credit, and especially where he has deprived the master of the means ordinarily possessed by him to obtain funds or credit. *id*

5. In determining the right to abandon as for a *technical total loss* in reference to the cost of repairs, the parties, *it seems*, are concluded by the sum inserted in the policy as the value of the vessel, and are not allowed to give proof of its *real value*. *id*

### INTEREST.

Interest is recoverable on money due under a special contract, as where compensation for services is agreed upon at a specific sum per month. *Still v. Hall*, 51

### J

### JUDGMENT.

Where, on demurrer to a declaration, judgment is rendered for the plaintiff, with leave to the defendant to amend on payment of costs, the plaintiff will not be permitted to enter judgment as of a previous term *nunc pro tunc*, although it be shown that the defendant died during the term in which the cause was submitted; the suit is abated, and the plaintiff must seek his remedy against the personal representatives of the defendant. It is only where the judgment is *final*, that it is allowed to be entered as of a term when the party was living. *North v. Pepper*, 677

See PARTNERSHIP. REDEMPTION OF LANDS.

### JUDGMENT AS IN CASE OF NON-SUIT.

A plaintiff suing in *forma pauperis*, is not liable to costs for not proceeding to trial pursuant to notice; nor is he, *it seems*, liable to costs under any circumstances, until he is dispaupered. The order allowing him to sue as a poor person will be annulled on motion, upon cause shown, and then he will be liable to costs in the same manner as though the order had never been made. *Steele v. Mott*, 679

### JUSTICES' COURTS.

See COURTS OF JUSTICES OF THE PEACE.





- may be required by *mandamus* to act in a particular manner, and even to reverse what they have already done. *id*
4. This court has power by *mandamus* to require a subordinate court to settle a case after the denial of a motion to set aside the report of referees, so as to enable the party to bring error; but not to direct what facts shall be inserted in the case. *The People ex rel. Werckmeister v. Superior Court*, 66
2. An owner or lessee who has goods on hand as a factor or commission merchant, and has a *lien* upon the same for charges or advances, may claim damages to the amount of his *lien*; but he is not entitled to claim the value of the goods for the benefit of the owner. *id*
3. A person having goods stored in a building destroyed, of which he is not a tenant or occupant, is not entitled to be a claimant under the act. *id*

## MAINTENANCE—212.

## MORTGAGE OF PERSONAL PROPERTY.

1. Notice of the existence of an unpaid prior mortgage of personal property, destroys the preference which a second mortgagee would otherwise be entitled to claim in consequence of possession not accompanying the first transfer, and by reason of the omission of the first mortgagee to refile his mortgage within the period prescribed by the statute. *Gregory v. Thomas*, 17
2. A second mortgage for the same debt does not extinguish the first; to render the second security a bar to the first, there must be a release express, or at least implied, from a co-tenant not to sue. *id*

See FRAUDS.

N

## NEW TRIAL.

In an action against a master for the negligence of his servant, it cannot be urged on a motion for a new trial, that the evidence did not establish the relation of master and servant, if such objection was not taken on the trial, either by a motion for a nonsuit, or by calling the attention of the judge to the point in his charge to the jury. *Ford v. Monroe*, 210

## NEW-YORK (CITY OF.)

1. Under the act subjecting the city of New-York to the payment of damages occasioned by the destruction of buildings by order of the Mayor, to prevent the spreading of a conflagration, no one but owners or persons having an estate or interest in the building destroyed are entitled to claim damages. *Mayor & Co. of New-York v. Stone*, 139

4. It is no bar to a claim that the party asking an assessment had effected an insurance upon the property destroyed, and has received moneys on such insurance. *id*
5. Interest upon the value of the goods lost, is a proper item in the estimate of damages. *id*

O

## OFFICES AND OFFICERS.

Commissioners for the erection of a public work, authorized by a special act of the legislature to be appointed by the governor, secretary of state, and comptroller, the duration of whose office is not prescribed by law, hold their offices during the pleasure of the authority making the appointment; and, of course, are subject to removal from office by the same authority. *The People, ex relatione Lyndes and Spinner v. The Comptroller of the State*, 595

See QUO WARRANTO.

P

## PARTITION.

Proceedings in partition under the "act for the partition of lands," passed 16th March, 1785, are not obligatory upon a party in interest, who at the time was a *feme covert*, and was not made a party to the proceedings, although they were had upon the application of her husband. *Zimmerman v. Rapp*, 100

See FIXTURES.

## PARTNERSHIP.

1. General reputation of a partnership, existing between two or more individuals, standing alone and not offered



- or including the return day. If the attachment be returnable after the non-enumerated days have passed, he may be called on the day of the return of the process, and a second time on the first non-enumerated day in the next term; but it is irregular after a call of a sheriff in one term, to permit a term to intervene before making a second call without *previous notice* to the sheriff. *id*
4. On setting aside an inquest taken at the circuit, the court will not, in addition to the usual terms of relief, impose the condition that the defendant shall abandon the defence of *usury*, or of the *statute of limitations*, if either of such defences has been interposed. *Allen v. Mapee*, 633
  5. Where a defendant in actual custody upon a *capias ad respondendum*, employs an attorney to defend the action, service of the declaration upon the attorney is a good service, and it is not necessary that a copy should be delivered to the defendant in person, or to the sheriff or keeper of the jail. *Thomas v. Curtis*, 675
  6. Nor is the defendant entitled to be discharged from imprisonment, if the declaration in such case be delivered to the attorney *absolutely*. *id*
  7. Where a defendant, after a demurrer, serves an *amended plea* as of course, the plaintiff is not bound to accept it unless it is accompanied with an affidavit as required by the 23d rule of this court; if, however, the plaintiff's attorney does not return the plea, or in some other way apprise the defendant that it will not be regarded as sufficient, he waives the objection, and the subsequent entry of the defendant's default for not joining in demurrer will be *irregular*. *City of Buffalo v. Scranton*. 676
  8. Where a suit was commenced by the filing and service of a declaration against the *maker* and *endorser* of a promissory note, and the declaration was served upon the *endorser* alone, who appeared in due time and put in a plea of the general issue, entitling it however as though he had been sued alone, not saying *impleaded with*, &c., and the plaintiff's attorney, with knowledge that it was intended as a plea in the cause, after retaining the plea seven days, treated it as a nullity, and entered the defendant's default: *it was held*, that the default was irregular, it being the duty of the plaintiff's attorney to return the plea or apprise the defendant that it was not regarded as sufficient. *Sands v. Bullock*, 680
  9. Where an attorney has not an *agent* at the places required by the rules for the receipt of papers, and a paper is put into the post office directed to him, the day the paper is *mailed*, and not when it is received, is the day of service. *Smith v. Durkee*, 684
  10. The service of a declaration on a defendant in a suit commenced by the filing and service of a declaration, is not a violation of the statute, forbidding the service of *civil process* on an elector during the time appointed for the election of state and county officers. *Cortis v. Holmes*, 681
- See ACTIONS IN GENERAL.
- AMENDMENTS.
- BAIL.
- COURT FOR CORRECTION OF ERRORS.
- EJECTMENT, 2.
- JUDGMENT.
- JUDGMENT AS IN CASE OF NON-SUIT.
- REPLEVIN.
- USURY.
- PRINCIPAL AND AGENT.
1. A contract of sale by a *factor* or agent, entrusted with goods for the purpose of sale, is *valid*, and will protect a purchaser against the *principal*, although no money is advanced, or negotiable instrument or other obligation given *at the time* of the contract; it is enough if an obligation be subsequently entered into *on the faith of the contract*, at any time whilst it remains unrescinded; It was accordingly held in this case, that the subsequent *endorsements* of promissory notes, and in anticipation of which the property was transferred, gave effect to the contract. *Jennings v. Merrill*, 9
  2. A *release* executed by an attorney in his own name, and *not in the name of his principal* by himself as attorney, is not obligatory upon the principal; and *parol* proof is inadmissible to show an adoption of the act, by the principal receiving the *consideration* of the release. *Wells v. Evans*, 251
  3. *It seems*, however, that though the acceptance of the consideration by the principal may not be shown to give validity to the release, yet that evidence of the receipt of the money is admissible to show payment in *whole*



7. Payment in a check on a bank is not good; money or its equivalent must be paid. *id.*

### REPLEVIN.

1. In *replevin*, where the defendant justified the taking as a distress for rent in arrear in the form of a *plea in bar*, concluding with a prayer of judgment and for a return of the goods, the plea differing from a *cognizance* only in its commencement; and the defendant treated the plea as a *cognizance* and put in *three pleas* in answer thereto, and the defendant moved to strike out the pleas of the plaintiff on the ground that but *one answer* could be put in to such plea, and that by way of *replication*—the motion was denied, the court holding that the defendant having committed the first fault, had no right to complain. *McPherson v. Melhinch*, 671
2. Whether a justification pleaded in the above form, instead of by *avowry* or *cognizance*, would be bad on demurrer, *quere?* *id.*
3. In *replevin*, the bond to the sheriff must be executed by *two sureties*. Where there is but *one surety*, the defendant may move to set aside the proceedings, and is not bound to except. The plaintiff, however, on payment of costs, will be allowed to amend, by filing a new bond with sureties, and the sureties justifying. *Whaling v. Shales*, 673
4. *Subsequent* acceptance in whole or in part of the article agreed to be sold, renders the contract valid; though it seems it is not so as to the payment of earnest money. *id.*
5. Although by the terms of a contract an article agreed to be delivered is to be of a *merchantable quality*, still if an inferior article be delivered and accepted, the purchaser when called upon for payment is not entitled to a reduction from the contract price, on the ground of the inferior quality of the article; he must refuse to accept it, or if its inferiority be subsequently discovered, he must return it, or require the purchaser to take it back. *id.*
6. Where goods are obtained by a purchaser by false representations as to his ability to pay, and by suppressing the truth, the vendor may rescind the sale, and after demand and refusal bring an action of trover against a sheriff who has levied upon the goods by virtue of an execution against the purchaser. *Hitchcock v. Covill*, 167
7. It seems, that where goods are ordered by the purchaser to be sent to a particular place, and the course of business at such place is for the warehouse-man to keep them until called for or ordered on by the owner, the *transitus* is ended, and consequently the right of stoppage is terminated. *id.*
8. It is no answer to the action that the claim was originally placed upon the right of stoppage in transitu, if subsequently and before the sale a general demand was made; and especially where the sheriff took an indemnity. *id.*

See CONTRACTS, 7.

### RIVERS.

See DEED.

### S.

### SALE OF CHATTELS.

1. An auctioneer who sells stolen goods is liable to the owner in an action of trover, notwithstanding that the goods were sold, and the proceeds paid over to the thief without notice of the felony. *Hoffman v. Carow*, 21
2. The exception of sales in market overt which prevails in England is not recognized here. *id.*
3. Where a contract is made for the sale of an article of merchandize at a stipulated price, although the contract be void under the statute of frauds, the price agreed upon may be reco-
9. Where the owner of personal property has not conferred upon the vendor the apparent right of property or right of disposal, a purchaser is not protected against the claims of the owner, though such purchaser acquire the property for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim or of suspicious circumstances, calculated to awaken inquiry, or put him on his guard; and it was accordingly held, in this case, that the purchaser of a part of a cargo of a vessel was not protected against the claims of the real owner, although the purchase was made under a bill



4. In *slander*, a plaintiff may in the same count charge words not actionable in themselves, in aggravation of damages; and in such case the defendant is not at liberty to *demur* to some of the words and take issue upon the others. *Dioyt v. Tanner*, 190
5. It is not a *misjoinder* of causes of action to charge in the same count words imputing to the plaintiff, that he had counterfeit bills in his possession with intent to pass the same, and that he had in his possession plates in the similitude of bank bills, with intent, &c. *id*
6. Where in an action of *slander* the plaintiff alleges *special damage* in consequence of *reports* of the existence of facts such as are alleged to have been imputed to the plaintiff by the defendant, to entitle him to give evidence of such special damage, the plaintiff is bound to prove that it was the consequence of the defendant's slander. *Hastings v. Palmer*, 225
7. In the latter case also *security* for refunding the money on the happening of certain events, will be required; but not in the former. *id*

See HIGHWAYS, 1, 2, 3, 4.

#### SUMMARY PROCEEDINGS TO OBTAIN POSSESSION OF LAND.

1. Under the statute authorizing *summary proceedings* against a person holding over and continuing in possession of real estate sold by virtue of an execution against him, proceedings may be had against the *servant* or *agent* of the debtor, or against a third person who has entered into possession under title derived from the debtor *subsequent* to the attaching of the lien of the judgment under which the property was sold. *Hel-lenbeck v. Garner*, 22
2. To justify a warrant against such third person, the fact that he entered under title so *subsequently* acquired must be distinctly alleged, or the conviction will be quashed. *id*

#### See LANDLORD AND TENANT.

#### SURROGATES' ORDERS.

1. A deed where a *sale* is had under a surrogate's order, omitting to *set forth at large* the order of sale made by the surrogate, is *inoperative* at law until confirmed by the chancellor; it need not be *literally* recited, but every substantial part of it should be set forth. *Atkins v. Kinnan*, 241
2. Where measures are authorized by statute in derogation of the common law by which the title to land of one is to be divested, and transferred to another, every requisite having the semblance of benefit to the former must be strictly complied with. *id*
3. So, where the interest of a party is to be affected by an order which is required by *statute* to be drawn up in a *specified form*, the requirement must be exactly pursued, or the order is void. *id*
4. The corporation who set the proceedings on foot may, by leave of the court, *discontinue* them at any time before the *final confirmation* of the report; and they may do so if the report has been sent back to the commissioners for review in *one or two particulars*, although *approved* by the court in *most respects*. *id*
5. On a motion by the corporation for leave to discontinue, affidavits showing the *impolicy* and *injustice* of granting the motion are inadmissible. *id*

#### STREETS.

1. Proof of actual possession of a lot adjoining a street, shows a constructive title in the occupant to the soil *usque filum vie*. *Willoughby v. Jenks*, 96
2. But to give such title, the street must have been accepted by the public as such; although dedicated, if not accepted, it remains the property of the original proprietor, subject to the easement or right of way of the purchasers of lots adjoining the street. *id*
3. Until a *final confirmation* of a report of commissioners of estimate and assessment in the laying out or widening of streets, individuals whose property was contemplated to be taken, do not acquire any *vested rights* in respect to the damages assessed. *In the matter of Anthony street, N. Y.* 618

# INDEX.

4. A surrogate's order of sale of real estate for the payment of debts, can not ordinarily be impeached collaterally even for fraud; if the surrogate obtains jurisdiction by the presentation of an account of the estate and debts of the deceased, his adjudication that the personal estate is insufficient for the payment of debts followed by an order of sale, is conclusive in any collateral proceeding. *id*
5. Such adjudication is examinable only on appeal, or by a proceeding in the nature of an appeal. *id*
6. It seems that an account of debts, stating neither the names of the creditors, the amounts due them severally, nor the consideration of indebtedness, would not confer jurisdiction upon the surrogate; nor, it seems, would funeral expenses of the deceased be a proper item of such account. *id*
7. A penalty incurred by the deceased in a contract made by him while living, is a proper item of such account, and will be deemed due to its whole amount, either as equivalent to actual damages, or as stipulated damages. *id*

## T

### TENDER.

A tender of money in payment of a debt to be available, must be without qualification, i. e., there must not be anything raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered; and it was accordingly held, in this case, that the tender of a sum of money in full discharge of all demands of the creditor, was not good. *Wood v. Hitchcock*, 47

### TROVER.

1. Where property is levied upon by virtue of an attachment, and subsequently a second levy is made upon the same property under another attach-

ment, the officer making the levy is not entitled to a return of trover against the party who has illegally taken and sold. *Dubois v. Harcourt*,

2. Whether goods attached to the plaintiff if he be taken under a second subject to the first, &c.

See SALE OF CH  
TRUST;  
See DEVISE

TURNPIKE;  
See CORPORAT

## U

### USURY

Where the defence to a writ of usury, and the plea hath been so as to entitle the party to examine a witness, the defendant may claim the personal attendance of the plaintiff when the latter is a witness, or to accept a commission to examine the plaintiff; the court however make any order, the proper course to the circuit judge to al in case the plaintiff after receiving notice *Bosworth v. Perham* See CONTRACTS, 7.

## W

### WATER AND WAT

See DEED

### WILL

See DEVISE

### WRIT OF IN

See DAMAGES

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